

C A N A D A
PROVINCE DE QUEBEC
DISTRICT DE MONTREAL

C O U R S U P E R I E U R E

sou. [REDACTED] e: L'HONORABLE ANDRE DENIS, J.C.S.

N°: [REDACTED]

JTI-MACDONALD CORPORATION
IMPERIAL TOBACCO CANADA LIMITED
ROTHMANS, BENSON & HEDGES INC.

demandereses,

- c. -

LA PROCUREURE GENERALE DU
CANADA

défenderesse,

- et -

LA SOCIETE CANADIENNE DU CANCER
intervenante.

Volume 5

CH020121.A

Le 21 janvier 2002.

COMPARUTIONS

Me MARC-ANDRE BLANCHARD,
Me YAN PAQUETTE,

pour la demanderesse Rothmans, Benson & Hedges.

Me CATHERINE McKENZIE, Me DOUGLAS MITCHELL (p.m.)
Me GEORGES THIBAUDEAU,

pour la demanderesse JTI-Macdonald Corporation.

Me SIMON V. POTTER, Me MARC PREVOST,
Me GREGORY BRIAN BORDAN,

pour la demanderesse Imperial Tobacco Canada Limited.

Me CLAUDE JOYAL, Me MARIE MARMET,
Me MARC RIBEIRO, Me MAURICE REGNIER,
Me GUY GILBERT, c.r. Me JEAN M. LECLERC,
Me SOPHIE TRUESDELL-MENARD,

pour la défenderesse.

Me JULIE DESROSIERS, Me CHRISTIAN TREPANIER,
Me ROBERT CUNNINGHAM,

pour l'intervenante.

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| Q- Now, I'd like to draw your attention to the situation in India. Do you know what is the percentage of cigarette consumption in India, by comparison to other products, other tobacco products? | 935 |
| Objection #4 (à la question 175) | |
| Q- You just told us, sir, that such a comparison is useless if you don't take into account price and many other factors. | 942 |
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| Q- So who am I to believe, sir, the US Surgeon General or the WHO? | 959 |
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| Q- Yes, yes, my question was, without the distribution of these free samples... do you know how many people became addicted to cigarettes by reason of the distribution of these free samples? | 963 |

LISTE DES OBJECTIONS (SUITE)

Objection #7 (Me Douglas Mitchell)

My Lord, I'll object to that. I don't think that when you quote from three (3) pages of a four hundred some odd page document that it is relevant, in cross-examination of one expert who couldn't testify whether the contents were accurate or inaccurate, it's appropriate to file an entire book in this fashion. 971

Objection #8 (à la question 267)

Q- Well, do you know at what age normally
people start smoking? 990

Objection #9 (à la question 312)

Q- You've been repeating, sir, before the House of Commons Committee, before this Court in nineteen eighty-nine (1989) and now today that advertising bans have no effect on consumption, and now Mrs. Hoek tells us that, well, we should take into consideration the fact that nicotine is an addictive... tobacco consumption is an addictive behaviour. Does that not challenge your theory and your conclusion, sir? 1018

L'an deux mille deux (2002), ce vingt et unième (21^e) jour
du mois de janvier:

LA COUR (L'HONORABLE JUGE ANDRE DENIS, J.C.S.):

Dans les détails, on devait parler de Londres. 5

Est-ce que c'est... pas tout de suite qu'on en parle?

Me SIMON POTTER,

pour la demanderesse Imperial Tobacco Canada Limited:

C'est mieux de ne pas en parler tout de suite.

LA COUR:

10

Très bien.

Me SIMON POTTER:

Nous avons certaines nouvelles. Brièvement, il
paraît que nous pouvons viser la semaine du quatre (4).

Monsieur Power doit vérifier s'il peut aller de sa 15
maison, qui est à Dorset, à Londres pendant la période
de cela, mais nous pensons pouvoir confirmer plus tard
aujourd'hui ou demain que la semaine du quatre (4),
c'est la semaine cible.

LA COUR:

20

Quatre (4) mars?

Me SIMON POTTER:

Oui.

LA COUR:

25

In the year of Our Lord, two thousand and two (2002) on this twenty-first (21st) day of January, PERSONALLY CAME AND APPEARED:

MICHAEL JOHN WATERSON (EXPERT), being 56 years of age, 5
residing at [DELETED]

WHO, after having made a Solemn Affirmation, doth depose and say as follows:

10

THE COURT:

1 Q- Mr. Waterson, if you prefer to sit down, it's up to you, or change position...

A- I'm fine, thank you, My Lord, at the moment. But if I get tired, I might like to take... 15

2 Q- Up to you.

A- ... advantage.

3 Q- Okay.

So, Maitre Potter?

20

EXAMINED (EXPERTISE) BY Me SIMON POTTER

on behalf of Plaintiff Imperial Tobacco Canada Limited:

4 Q- Well, Mr. Waterson, let's tell the Court a little bit about yourself. I can see from your CV that you have a B.A. in Economics and an M.A. in Marketing. Could 25

THE COURT:

5 Q- Would you prefer to give your testimony in French?

A- No.

6 Q- No? It's up to you.

A- I'm more fluent in English, and I may help myself in 5
French from time to time, but...

Following that, I went to an organization, a
trade association called The Advertising Association.
I'd become very interested in writing and lecturing on
advertising subjects and this job wasn't a fixed hourly 10
contract, I had the liberty to do other things at the
same time. It was approximately a three (3) or four
(4) day a week job.

I then worked for The Advertising Association.
I still today work for The Advertising Association, now 15
twenty-five (25) years further on, but for the past ten
(10) years also only as an occasional consultant.

I started my own company approximately fifteen
(15) years ago, initially in the area of advertising,
publishing and then added a second company to that, a 20
corporation, approximately ten (10) years ago,
specializing in economic indexes. We produce and
publish a great number of economic indexes with the
Reuter's Company and with various large banks and
financial institutions.

25

MICHAEL JOHN WATERSON
PLAINTIFFS
EXAMINATION (EXPERTISE)

The original publishing company operating in the advertising world, subsequently, along with many other people, three (3) or four (4) years ago, we decided that the Internet was probably the future for professional publishing. We've lost a great deal of money, but have come to dominate our market, and we now have the only professional company offering professional information to major advertisers like Proctor & Gamble, major advertising agencies, major media buyers, frequently through their Internet.

So our information goes directly through the Proctor & Gamble Internet through the G. Walter Thomson, one of the world leading advertisers, advertising agencies, Internet, and so on.

Me SIMON POTTER:

Q- What is this information which you make available to them?

A- It is information about how to advertise, how to test advertising, how to measure advertising. There are many other companies offering news and various other pieces of information about the advertising world, but, I suppose, in many ways we're the equivalent to companies like West Law, providing simply professional information, no gossip, no information of people

changes, simply pure professional information about how to do advertising, how to measure advertising, and how to test advertising, all of those sorts of related activities.

8 Q- And do you arrange for the publishing of any other 5
advertising-related data?

A- We publish a lot of numbers for the advertising industry. I've, for the past twenty-five (25) years since becoming involved with The Advertising Association, published the official advertising 10
industry statistics for the European Union and for the UK. As part of that, we publish a document called "*World Advertising Statistics*" and a number of other statistical documents.

At one point, five (5) or six (6) years ago, we 15
were going to expand the company to produce a whole series of documents on world trends, and this is where some of my information comes from. We have a publication called "*World Advertising Trends*", we have another one called "*World Drink Trends*", and... 20

9 Q- What do you mean by "*drink*"?

A- Alcoholic drink, soft drinks, the whole of the world of drink, but not things like milk and so on, commercially produced drinks of the kind you find in bottles and so

MICHAEL JOHN WATERSON
PLAINTIFFS
EXAMINATION (EXPERTISE)

the worldwide media companies that carry the advertising, obviously, without advertising most modern medias simply couldn't exist.

12 Q- Now, in your CV, we see a list of publications, about
two hundred and seventy-three (273) publications and a 5
list of several speeches, all having to do with
advertising, economics or statistics. But we see that
the list stops in nineteen eighty-nine (1989), Mr.
Waterson. Have you been doing nothing since nineteen
eighty-nine (1989), what's happened? 10

A- In or about that time, I started to seriously consider
the prospect of developing my main focus in life, first
the company that I started in nineteen eighty-five
(1985). Up until the late eighties ('80's), it was a
very small part-time occupation but the company kept on 15
going and I thought I had to give much more of my time
to it. So, I virtually abandoned all other occupations
at that point in time, then growing the company. I
stopped giving speeches because although many people
advised me to give them, I felt it wasn't the best use 20
of my time and, ditto, I stopped writing. I had
previously written a great deal but I simply couldn't
find enough time any more. So, there was a major
change in my occupation.

13 Q- And what have you done since nineteen eighty-nine 25

MICHAEL JOHN WATERSON
PLAINTIFFS
EXAMINATION (EXPERTISE)

(1989) to stay up to date, if anything?

A- I've remained on the board of the... on the council of
the Advertising Association, which, in London, which
brings together the three (3) main elements of the
advertising business: the advertisers, the agencies 5
and the media. I frequently attend meetings, industry
meetings of one kind or another. I have remained as
the producer of Advertising Statistics.

Most important of all, I've tried... I don't
regard my skills as managing people as being a 10
traditional managing director, I've tried to keep up to
date with trends in the advertising industry. I have
invented or developed all of the products that the
company has and I've done that largely by talking to
people, by maintaining contact with all the various 15
elements of the advertising industry, and in short, in
remaining part of the advertising industry, or
maintaining very considerable contacts with the
advertising industry.

I've never spent more than two (2) days a week 20
actually within the publishing company that I'm a major
shareholder in. I spend most of my time in London, or
in Brussels or Paris, talking to people and even in New
York, talking to people working in the advertising
industry in order to develop products that will help 25

them do their jobs better.

14 Q- And when you say "Working in the advertising industry",
does that mean you've been consulting or what is it?

A- I have been a little bit... I'm frequently asked to do
consultancy but I've done very little. What it really 5
means is I continuously meet and talk with and discuss
advertising, I talk to them about the products we're
producing, I visit advertising agencies frequently,
media companies and big advertisers, and in general,
try to understand how their lives are developing the 10
kinds of problems they have in testing and measuring
advertising expenditure and its effects, and so on.

15 Q- And have you ever testified as an expert before, Mr.
Waterson?

A- I've testified before the House of Representatives and 15
the Senator... before the House of Commons, in Canada,
before numerous councils of Europe, EU and UK,
parliamentary committees or committees of one...
government related committees of one sort or another
and, indeed, in one (1) or two (2) of the countries, I 20
think I remember I testified, I believe, in Australia
and possibly Hong Kong, but that was a long time ago.

16 Q- Have you not testified in Canada?

A- I did say, before the Canadian House of Commons.

17 Q- Oh! And have you testified in a courtroom in Canada? 25

MICHAEL JOHN WATERSON
PLAINTIFFS
EXAMINATION (EXPERTISE)

A- And, of course, ten (10) or eleven (11) years ago, I was before this particular court on this particular question.

THE COURT:

18 Q- With another judge, I guess.

5

A- I'm sorry?

19 Q- With another judge.

A- With another judge.

20 Q- Uh-huh.

A- A Mr. Baker, I believe, on the... right, I remember him very well. 10

21 Q- So, welcome again.

Me SIMON POTTER:

Well, with that, My Lord, I would like to offer Mr. Waterson as an expert and ask that he'd be qualified as such an expert in the functions, effect and economics of advertising. 15

THE COURT:

So, will you please repeat. In the functions, effects and economics of... 20

Me SIMON POTTER:

Functions, effects and economics of advertising.

THE COURT:

Okay. Cross-examination on that ground?

25

MICHAEL JOHN WATERSON
PLAINTIFFS
EXAMINATION (EXPERTISE)

CROSS-EXAMINED (EXPERTISE) BY Me MAURICE REGNIER:

22 Q- In your report, sir, you were asked, you claimed, you state that you were asked by counsel to review how brand advertising works in markets and what impact brand advertising has on behaviour. That's correct? 5

A- That's correct.

23 Q- Do you have any degree in psychology or consumer behaviour?

A- No.

24 Q- Have you published any paper about the psychology of 10 consumer behaviour?

A- No.

25 Q- Have you published in the *Journal of Consumer Research*?

A- No.

26 Q- Have you an expertise in the field of behaviourism? 15

A- No, I haven't.

27 Q- When you testified before this court ten (10) years ago, sir, you were asked what were your qualifications, do you remember?

A- It was a long time ago. 20

28 Q- To help you, sir, have you reviewed your testimony?

A- I reviewed my testimony but I didn't review the... I don't remember the questions relating to my expertise. But I have reviewed my testimony.

29 Q- At a question from Mr. Baker, you said, at page 2548,
that: " *I am an expert, at least as far as having done
it a lot in the collection of advertising statistics
and data*". That's in nineteen eighty-nine (1989), so
was that the case at the time? 5

30 Q- I had worked for one of the world's major advertisers
for many years and I had been involved with advertising
at that point in time for many years. The
psychologists that you speak of, I have very rarely
encountered in the real world. Many academics speak of 10
the psychology of advertising and that sort of things,
but in my career, working for or working with
advertising agencies and major advertisers, I very
rarely meet these people.

31 Q- When you said at that time that you are an expert in 15
the collection of advertising statistics and data, is
that still the case?

A- Yes, that's still the case, I still to this date
produce the official advertising statistics for the
European Union and for the UK, and publish numbers of 20
books of world advertising statistics.

32 Q- And these books deal with all kinds of statistics, not
only with tobacco statistics?

A- They don't deal with tobacco statistics at all, the

advertising books, they simply deal with advertising statistics with statistics on the amount of advertising, the kinds of advertising that exist, and so on.

33 Q- We were provided by counsel one of your books, I 5
believe that has been published for the Advertising Association by NTC Publications entitled *UK Market and Social Trends 2001*.

A- That's correct.

34 Q- Do you recognize this book? 10

A- Yes, I do.

35 Q- This book is about, and you'll correct me if I'm wrong, social trends for example in employment, housing, leisure, crime, transport in the UK, that's correct?

A- That's correct. 15

36 Q- And I believe that that does not make you an expert in the field of crime, leisure, environment, or transport?

A- I now have approximately a hundred (100) people working for me, and that book was produced by some of those people not by me, but it certainly doesn't make... the 20
fact that I am part owner of the company that produces a book that contains crime statistics obviously doesn't make me an expert on crime.

37 Q- And you mentioned to this Court that you testified

before the House of Commons Committee that was studying
Bill 504 and Bill C-51. Did you review your testimony
before this Committee before coming to court?

A- I didn't review that one, no.

38 Q- So I have a copy for you, sir, a copy for the Court, a 5
copy for my friends, which I shall file as Exhibit D...

THE CLERK:

33.

Me MAURICE REGNIER:

10

Thank you.

39 Q- At page 24826...

That's an extract, My Lord, from the Court of
Appeal record.

THE COURT:

15

I'm sorry, what page?

Me MAURICE REGNIER:

24826.

Me SIMON POTTER:

That is the Attorney General's page numbering and 20
not the numbering on the...

Me MAURICE REGNIER:

That's correct, from the... that's an extract I'm
taking, that's what I said, Mr. Potter, that's an

extract from the Court of Appeal record in the TPCA, CA
case.

Me SIMON POTTER:

Uh-huh.

Me MAURICE REGNIER:

5

40 Q- You said in an answer to Mr. Brightwell...

I've highlighted, My Lord, the... le passage.

Mr. Brightwell was asking you,

"Mr. Waterson, I'm wondering about the
effects of banning advertising in
Norway and England. I am not sure if
the right demographics were looked at.

10

For instance, did you study the
population that would be liable to buy
cigarettes? The population over 15 I
understand is where you would look.

15

Did you study the taxes, how they had
increased; the relative price of
cigarettes and the real cost in terms
of hours of work to buy a package of

20

cigarettes? Were these built into
your studies and into your critique?
You mentioned only... - I'm sorry
there was a hole in the page - ... and

not the others."

And you answered,

*"I have not personally done any
detailed work on the tobacco market.
The professional consulting group,
Metra, did do this."*

5

That was in nineteen eighty-eight (1988). Now, since
nineteen eighty-eight (1988), have you personally done
any detailed work on the tobacco market?

A- I have done no econometric studies or detailed work on 10
the tobacco market of the kind that Mr. Brightwell was
referring to here.

41 Q- At page... still from the Court of Appeal record, page
24830, in an answer to Mr. Speyer's question, he was
asking you,

15

*"Now, do you have a bias, not in terms
of your empirical research, but are
you in the employ of anybody who...?
Obviously you are over here not on
your own. You have been retained,
there is nothing wrong with that, I,
as a lawyer, retain experts all the
time, but how did you get involved in
this?"*

20

And you said... you answered,

"I have a tremendous bias. My salary comes from the advertising business. We find ourselves, in the UK, attacked all the time by people we call single-issue fanatics. They are people who become obsessed by tobacco or drink or, as in the current case in the UK, by fur. We have dreadful advertisements, some being shown in the cinema, showing flesh being torn from animals and things of that kind. We have lots and lots and lots of these kinds of people in the UK, as indeed there are in America and I presume in your country."

5

10

15

You remember having said that, Mr. Waterson, at the time?

A- I do, yes. I remember the general feelings that were presented at that time. There was a great deal of aggravation and aggression in the people that were attacking the industry. It has since cooled down a little bit, but we now have people of the same kind who are attacking food advertising and pharmaceutical

20

advertising and virtually all kinds of advertising under some form of attack. So I think the sentiments, I would suggest, have widened since then rather than stayed the same.

42 Q- And would you call these people who attack food 5
advertising for example as being single-issue fanatics?

A- The word single-issue fanatic, I believe, was invented by *Bennet Levin* who is a famous writer for the *Times* of London. Many of these people do become obsessed with a single subject and tend to believe that the world 10
will become an infinitely better place if we have no food advertising or no drink advertising, or no tobacco advertising, or perhaps nothing at all, but then, of course, we shall have no newspapers either, so perhaps the world would be a better place in that sense. 15

The... I do believe that the word... that the single-issue fanatic appellation is not a bad one for some of these people, as I think I said in cross-examination for this trial, ten (10), eleven (11) years ago, there have been some extraordinary statements made 20
about advertising by people involved in the tobacco debate, and the drink debate, and the food debate. I believe I referred to an organization called *Bugger Up*, an Australian organization, that went around defacing

billboards, I don't remember what the acronym stood for but they went around spraying can... defacing billboards and they had come to the conclusion that advertising was a kind of polluting influence in the whole world and that many elements of it should be destroyed and banned, and I think that for people like this the word fanatic is a suitable description. 5

43 Q- Is it your opinion, sir, that the Canadian Government is acting as a single-issue fanatic against tobacco advertising? 10

A- I don't think...

Me SIMON POTTER:

Excuse me, are we in the qualifications phase or are we actually asking what his opinion is?

Me MAURICE REGNIER: 15

I think, My Lord, that the Court has the right to appreciate the objectivity of the witness' testimony.

THE COURT:

At this stage?

Me MAURICE REGNIER: 20

Well, this stage or whatever stages.

THE COURT:

No, we are in a very early stage now, to qualify...

Me MAURICE REGNIER: 25

Well, that's what I believe I always saw that an expert has to be objective and there to...

THE COURT:

Under reserve.

44 Q- So, what's your answer, sir?

5

A- I don't believe that the Government has made statements about... I don't believe that the Canadian Government or any other government I know has suggested that advertising is a great polluting device, that it should in a large measure be banned. I'm trying to remember 10 the description of one famous American academic who referred to it... I don't remember the precise terms but there was a gentleman called Wallack, who I believe was referred to in one of the earlier cross-examinations, who described advertising as a one-way 15 communication, a way of pushing people to do things in very pronounced ways that was inherently bad, and that I don't believe the Canadian Government or any of the major governments has suggested things like that.

The reference to single-issue fanatics was a 20 particular reference at that time to people who were undertaking very very aggressive and hostile activities, mainly illegal, in order to stop particular kinds of advertising. And I don't think that kind of description fits the Government at all, or at least not 25

the Canadian Government.

Me MAURICE REGNIER:

45 Q- So would you, in the same line of questions, sir, would
you consider the World Health Organization, who's a
strong advocate for restrictions on tobacco products, 5
as being a single-issue fanatic?

A- No no. The World Health Organization has been very
active in trying to get drink advertising banned, and
I believe that they have made certain statements about
food. So, single-issue fanatic certainly wouldn't be 10
a correct appellation multiple... some people might
use, but I certainly wouldn't.

46 Q- Are you aware of the position of the World Health
Organization on tobacco restrictions on promotion?

A- I believe that the World Health Organization has on 15
several occasions made reference to the fact that an
advertising ban would be a good thing. I also believe
they have produced a variety of literature relatively
recently which shows the total ineffectiveness of
advertising bans in places like Norway. So they... 20
they are saying things with one hand, but producing or
assisting in the production, or helping in the
production of information on the other which tends to
negate what they're saying.

47 Q- Are you aware of the position of the World Bank on 25

tobacco promotion restrictions?

A- I don't believe, I could be wrong, but I don't believe the World Bank has an official position. I think it has published a paper which has made some suggestions, but I don't believe, I could be wrong, that the World Bank has an official position on this issue. 5

48 Q- And would you consider the United States Surgeon General as a single-issue fanatic on the issue of tobacco restrictions on promotion?

A- No no. The U.S. Surgeon General has made a number of very sensible statements, as have many doctors involved in smoking. I certainly wouldn't take a position on the medical issues at all. I'm only here to talk about advertising. 10

49 Q- And are you aware of the position of the U.S. Surgeon General on tobacco advertising and promotion? 15

A- I was aware of the position of the Surgeon General ten (10) years ago, and I don't believe it was very favourable. I'm not aware what the current position is, but I would believe it hasn't, in all likelihood, changed very much. 20

50 Q- So you did not keep yourself up-to-date as to the position of the United States Surgeon General on this issue?

A- No.

25

to appreciate the impact of advertising in particular areas, particular markets, and in general in knowing how advertising works, but in producing advertising, not.

52 Q- No further questions, My Lord.

5

THE COURT:

Thank you. Do you have any objection on the qualification of the witness?

Me MAURICE REGNIER:

The way it's formulated by Mr. Potter, yes, I do. 10

I would suggest, if the Court is to qualify the witness, that it should be done in the very same words that Mr. Waterson used in his past testimony, that he is an expert in the collection of advertising statistics and data. 15

Me SIMON POTTER:

Well, he is an expert in that, My Lord, but it's very clear from Mr. Waterson's testimony that he is also an expert in measuring the effects of advertising and in knowing just what is the function of advertising 20 in particular markets, and I think he should be qualified as an expert in the functions, effects, and economics of advertising.

Me MAURICE REGNIER:

If I may reply on that, My Lord? I think that 25

MICHAEL JOHN WATERSON
PLAINTIFFS
CROSS-EXAMINATION (EXPERTISE)

Mr. Waterson honestly told the House of Commons Committee in nineteen eighty-nine (1989) that he did not personally conduct any studies on the tobacco market and that since nineteen eighty-nine (1989) no such studies were made. He's not an econometrician, 5 and I think that's an important quality if you want to be qualified to be able to measure the effects of restrictions on markets. He's not a consumer behaviourist as well.

So I think that we really should restraint Mr. 10 Waterson's qualification to the way that he very honestly put to the Court in nineteen eighty-nine (1989).

THE COURT:

So the Court declares the witness expert in the 15 functions, effects, and economics of advertising.

Me SIMON POTTER:

Thank you.

THE COURT:

You may go on. 20

Me SIMON POTTER:

Before we go further, then perhaps we should put a label, Mr. Waterson, on your expert report and CV, and that will become Exhibit P-36.

THE COURT: 25

53 Q- Take for granted, sir, that I've read your report.
Maître?

Me SIMON POTTER:

Thank you, My Lord.

5

EXAMINED BY Me SIMON POTTER

on behalf of Plaintiff Imperial Tobacco Canada Limited:

54 Q- Mr. Waterson, I don't propose to have you read the
report now or to go through the thing in detail. In
fact, I'm going to try and elicit from you explanations 10
and additions to that report which will help the Court.

At pages 2 and following of your report, under
the title "*Role of Advertising*", you speak of the role
of advertising in marketing branded goods. Could you
explain to the Court what is the context of a market in 15
which an advertiser seeks to advertise branded goods
and what is the role of the advertising for that
advertiser?

A- Usually, the concept of marketing, which embraces
advertising, is a concept which suggests that any major 20
advertiser these days should actually seek to define
what it is that consumers are looking for in a product,
say, are they looking for a car that goes fast, or are
they looking for a car that will carry a family, or are

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they looking for a car that's very reliable?

There are many different kinds of way in which people look at the things they buy, and one of the great classic events of marketing history was when Ford, the Ford Company, decided to do a lot of research 5 into what kind of copy was wanted. And they went out and asked a lot of men who said they wanted a nice sports car with a hood, and one that could go very fast, and so they built one, called the Ford Edsel, which nobody wanted at all because most men have 10 children to carry around and most women want sensible things rather than... and so on and so forth. This event happened some forty (40) or fifty (50) years ago.

Today, we've achieved a rather more refined way of doing these things and we ask more specific and 15 correct questions. But the whole idea is to try... you're a car manufacturer and you want to build a new model, and you ask the public what specific holes there are in the market, what kinds of cars they might like to buy that don't exist, and when you've decided that 20 there is a match between some market need and your factory, for example, you then go and build a car and then advertise it. And obviously, if the car was designed to carry children and to be a family vehicle, or utility vehicle, then you would advertise it to 25

people who have families with that use in mind.

And that's pretty much the context in which most modern advertising is based, trying to do things that help people and then to tell them that you've done it.

55 Q- And in a market for branded products, can you give the 5
Court an idea of just how much advertising there is for
brands?

A- Worldwide, there is something like four hundred billion dollars (\$400,000,000,000), American dollars worth of advertising. There is a great deal of it that accounts 10 for very roughly one percent (1%) of world various domestic product. It's a major industry which funds the commercial media, it's a major industry which has lots of suppliers like advertising industries and it's a major industry without which none of the major 15 corporations of the world, like Proctor & Gamble, like Ford, could function. They're all involved in mass marketing, marketing to many hundreds of thousands or millions of people and they need to be able to tell hundreds of thousands or millions of people about their 20 products, if they're going to be able to survive.

56 Q- Now, at paragraph 6 of your report, you state that brand preference advertising does not seek radical changes in human behaviour. Could you explain that statement to the Court?

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A- The vast majority of advertising, the vast majority of brand advertising, obviously there are many other kinds of advertising, the Government, for example, is often the largest advertiser in countries. But brand advertising usually seeks to get the consumer to buy, 5 very simply, one kind of toothpaste rather than another. As you go into the supermarket, your hand hovers over the one brand, then there's another brand. And advertising, it tends to influence that decision to get you to buy one brand of toothpaste rather than 10 another.

We have something like... we have well over two-three thousand (2-3000) case histories on our database now, on our electronic database. And in only a tiny, tiny number of those case histories does the 15 ambition... the scope of the advertising campaign appears to be more than simply to get the consumer to choose one brand or another, which is a relatively humble desire. As soon as you move into more complex areas like trying to get consumers to stop smoking or 20 start drinking, or drive more slowly, then the advertising case becomes much more complex and much more difficult to my submission.

57 Q- For an advertiser of brands and products, what are the obstacles facing that advertiser? What is going on in 25

the market that makes it difficult for?

A- I think these... try to appreciate the difficulties is
to imagine yourself as an advertiser. If you have a
car which you want to sell, you will probably place an
advertisement in a local paper. No one would be under 5
the illusion that this would necessary produce a sale,
anyone that's in the market for buying a second-hand
car will check out prices, will check out other things
in the market and it's largely chanced that when you
have something to sell of a particular kind, there 10
happens to be somebody locally who refuses to buy. So,
one might have to advertise for weeks, months, to sell
a second-hand car; one might be reduced to trading it
in for a new car at a dealer because you're unable to
sell it. That has personally happened to me and it's 15
quite a common experience.

Advertising doesn't simply work like turning on
the top, you don't simply advertise and then have an
immediate reaction. And a corporation isn't exactly to
the same person as someone trying to sell a second-hand 20
car. There are many other factors which make people
choose one brand of toothpaste rather than another, one
may be cheaper, very simply, the price may be... have
a major impact and it frequently does, just as you
don't manage to sell your car because the man three (3) 25

streets down has the same model, roughly the same mileage, but several hundred dollars cheaper. So, one particular brand of toothpaste may be cheaper and this may out sway or conceivable advertising blandishments.

It may be that there's a quality difference. 5
Many products have different quality levels within
them. Say, for example, even something as humble as
the silver foil which you use in cooking.

58 Q- We call that aluminum foil.

A- Aluminum foil.

59 Q- Perhaps, in English, you use silver for that.

A- We...

60 Q- But we're reduced to using aluminum. *Aluminium.*

Me MARC-ANDRE BLANCHARD:

Because we produce it.

A- It is, indeed, aluminum foil, I think. But most people in the UK refer to it as Baker foil, after... a bit like the Hoover, after the original manufacturer. This is quite an interesting example, because it is not something that you would think of it having quality 20 differences and, in fact, the supermarkets took virtually all of that particular market by simply selling cheaper aluminium foil.

And it was only realized very late in the day,

when the Baker company actually came back into the market, having been nearly destroyed, by simply advertising something that you couldn't actually see but you could actually test when you had the foil at home. The quality differences do count very much if 5 you're using the foil and it splits or tears because it's very thin and cheap, it can be not the best bargain as it were.

So quality differences often have a major, major difference in a particular market. And there are many 10 other factors, what family and friends tell you: "Ah! we all use X, Y, Z brands". And this may have an impact. There are many factors in any individual market which can influence purchase decisions and advertising is never thought as simply: "Do we have 15 anyone there?". There are many other factors. Advertising is simply one element in what is called a marketing mix.

Me SIMON POTTER:

61 Q- I'd like to draw your attention to paragraph 7 of your 20 report, in which you make a distinction between a new, or rapidly expanding market. And on the one hand at a stable, or declining market in the other. Why do you make that distinction?

A- In a new market, of which there are not too many but, 25

for example, when the personal computer is invented or the video recorder was invented, there is something completely new that people have never seen before. The Internet, obviously, is another example. And in the very early days of such a product, it's entirely possible that advertising can communicate the simple existence of this product. If you're trying to... if you're trying to buy a car, you don't need to be told the car is in existence, since you've been used to it from very early days and the same is true of many products like drink, tobacco and so on.

If you are in the... if you are... if you see an advertisement for a brand new product called a personal computer, this may tell you something more than the fact that it's just an IBM computer. It may indeed 15 introduce you to the idea that there is such a thing in the world. Under waves of this kind of activity as human endeavour breaks new barriers but they tend to be fewer and far between, I think, the VCR and the personal computer, and the Internet, they're probably 20 three (3) of the most significant ones over the past twenty-five (25) years and I can't think of any others just about to break into the... the world at the moment.

In that particular situation, clearly, although 25

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the advertising will be for IBM personal computers and unless it's a very unusual product, there will be other forms of brand on the market. It is conceivable, although I've never seen evidence to the effect, it is conceivable that the advertising will expand the total 5 market simply by telling people that it's possible to buy a personal computer. They may then go out and buy an IBM or some other one but, at least, advertising could theocratically have that function.

In a market which has been in existence for some 10 time, the function of advertising is obviously quite different. There is no point or purpose when you're trying to get rid of your second-hand car, in trying to expand the market for second-hand cars, there would be no purpose in taking advertisement saying: "Buy a 15 second-hand car". What you're trying to do is to get them to buy your second-hand car. And exactly the same is true when you're trying to sell any individual product, whether it's toothpaste or major cars. You are trying to get them to buy your car and no purpose 20 would be served by trying to expand the total market.

So, there is a fundamental difference, I think, in that sense, between a new or rapidly expanding market and one which has fundamentally been around a 25

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long time, which of course constitutes ninety-nine percent (99%) of all market.

62 Q- And you say on that same page of your report, I think you refer to it as a primarily competitive nature, if someone wins someone has to lose, could you just expand 5 on that briefly for the Court?

A- In a stable, declining or indeed a market that is not going very fast, any company that suddenly becomes successful, and there are many many examples of this, where one is ever to do so at the expense of someone 10 else. In a stable market, for example the chocolate market, I believe, is stable in many countries of the world, if Mars sells more chocolate bars, it will almost certainly do so at the expense of Cadbury's or some other manufacturer. 15

If one product suddenly has a great success, then you may find other companies doing extremely badly, or even in extreme cases, going out of business.

63 Q- So in a market like that, can you explain to the Court what is the role of advertising, what does the 20 advertiser seek to do with his advertising in a market like that?

A- The advertiser simply seeks to increase market share, to take a bigger slice of the market. Well, it's conceivable that an advertiser will simply decide to 25

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try and hang on to the market share he's got. It's conceivable that he will try to increase his market share. In most cases I've been familiar with, companies strive to increase their market share. The executives which work for them want to increase their 5 salaries, to increase their personal marketability and therefore to create a success story, and there is an enormous pressure in the big competitive markets like soap powder, and vehicles, and so on, to increase market share. Many of these corporations have 10 shareholders who similarly are very aggressive in pushing for increased market share.

A company that achieves an increased market share may gain hundreds of millions of dollars extra in revenues and profits, particularly in a mass marketed 15 product where costs tend to be relatively fixed, or many of the costs involved in developing a product tend to be fixed, the drug companies, the ultimate example there, you spend billions of dollars in some cases developing a new drug and then every additional pill or 20 whatever it is that you sell comes straight to the profit line rather than being dissipated in further costs.

Microsoft is the best possible example that, of course, where each additional item that's sold has no 25

marginal cost at all because it's a piece of software.

So in many corporations, the aim is to increase market share and very simply to benefit and to make a lot of money, one single point of market share can be worth hundreds of millions of pounds and... or dollars 5
in any of the big markets of the world.

Conversely, they try to avoid being exterminated. A company that is very unsuccessful will simply go out of business and unless it fights to try to protect its market share, this may well happen to it with very bad 10
consequences, one single point loss of market share, just as it can gain hundreds of millions of dollars, can effectively lose hundreds of millions of dollars for a company if it starts to lose share.

So keeping and gaining market share is of 15
absolute prior importance to most modern corporations.

64 Q- In advertising to consumers in markets like this, does the advertiser have to take into account the fact of the consumers seeing advertising for other brands?

A- Absolutely, the... it would be very difficult to avoid 20
seeing advertising for other brands. If you are in the market for a car, you will actually seek out advertising for the various brands that you're looking for. If you're looking for a utility vehicle, you will deliberately try to find advertising of various sorts 25

for the various vehicles on the market.

In the case of something less significant like
toothpaste, you are most unlikely to seek out
toothpaste advertising. You may desperately try to
ignore it, and therefore, it's... the advertising for 5
insignificant products tends to be noisy and loud and
appear on television rather than the hidden away in the
back of specialist magazines.

So where you're seeking to sell a product of the
toothpaste variety, you will try to make sure as many 10
customers as possible that are in the particular
segment you're trying to attract will see your
advertising and you will probably use the same media as
your competitors, you will probably use the same basic
methods as your competitors. 15

Once you determine to try to sell running shoes
to athletes, you will focus your advertising in places
where your competitors are very very likely to
advertise as well. So obviously, there is a difficulty
in trying to advertise without any kind of competitive 20
activity around it.

65 Q- From what you've said, Mr. Waterson, is there a problem
for advertisers catching the attention of their target
market?

A- There is a huge problem in getting the attention of 25

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consumers. There are in Europe something... it's estimated that there are something like a quarter ($\frac{1}{4}$) of a million brands, and I would think it very likely that in America and Canada, there are a similar number of brands on the market of all kinds, ranging from 5 clothing brands through to toiletries, to *et cetera, et cetera*, a huge number of brands.

If I ask you what advertisements you can remember that you saw yesterday, in all probability you might remember one (1) advertisement from yesterday, you're 10 most unlikely to remember two (2) or three (3), you certainly won't be able to remember ten (10) advertisements you saw yesterday, although you will have passed either in your newspaper or on television or on the street probably hundreds of advertisements of 15 one kind or another. Most of them you will have simply screened out as irrelevant to your particular life.

In any one (1) household in Europe, it has been estimated that there only of the order of two hundred and fifty (250) individual brands. So a quarter ($\frac{1}{4}$) of 20 a million products on the market all screaming for attention but you're only going to buy ever approximately two hundred and fifty (250) of them. The vast majority of advertising you are not interested in,

very few people are interested in. So the advertiser has great and considerable difficulty breaking through what is technically called "clutter", the simple profusion of advertisements for individual products. Many many products on the market, you're simply trying 5 to sell one (1) of many hundreds of thousands, and it's actually very difficult.

I personally remember from Guinness days, we were out spending all brands of light beer on the market combined, and yet we were having no impact whatsoever 10 on the market, and they were growing like fury, and this is a very common piece of experience. You have to have something to say for people to listen, and in most cases, you have nothing new to say about your brand and therefore find it very very difficult to become present 15 in the consumer's mind.

66 Q- At paragraphs 16 and 17 and so on of your report, Mr. Waterson, you then draw a distinction between that kind of advertising, the branded advertising that seeks to encourage the consumer to purchase one brand rather than another, and other kinds of advertising where people actually try to accomplish something grander. Can you tell the Court what you mean by that distinction and give some examples of the latter kind

of advertising?

A- There are two (2) main areas where organizations of one kind or another have attempted in the past to do more than simply get the consumer's hand to switch from one brand of toothpaste to another. 5

One of them, it's obvious, is generic advertising, where you advertise beer or furniture or books or something of that kind. Many of the generic campaigns that have taken place over the past twenty - thirty (20-30) years have been by governments, or 10 government funded organizations, or trade associations simply to sell agricultural surpluses, so trying to sell milk, which has been a common occupation of milk bodies of one kind or another worldwide for the past forty (40) years at least. Milk, eggs, tea, bread are 15 some of the ones I remember. The current one for fish in the U.K., which the fish merchants of the U.K. have demanded that government stop, on the grounds that it's totally ineffective, very recently.

There's another kind of advertising of that kind, 20 which is of course government health warning style advertising, so "Stop Smoking", "Chip Pan Fires", I remember quite vividly.

67 Q- "Chip Pan Fires" for people in Canada, are the grease fires for french fries. 25

A- That's right, yes. I remember a government campaign. There was an awful lot of people who were having fires of this kind and I remember the government pointing out the dangers of heating up large amounts of oil in your kitchen. So these kinds of things, governments have 5 repeatedly, or all their organizations, have repeatedly tried to do.

In some cases, there... I have a quote in my testimony from Marcus Grant, who was working for the World Health Organization at the time, pointing out 10 that over a hundred and fifty (150) alcohol education impacts, that is, had increased knowledge. You can tell people quite successfully about the dangers of smoking, or the dangers of drinking, or indeed the dangers of fires in the home and, actually, 15 communicating this intelligence is relatively easy. People will take it on board. Getting them to do something about it is quite another thing.

I suppose dieting is another great area where...

68 Q- I beg your pardon? 20

A- ... I'm sorry, where many people take on board the knowledge that they would be better off minus a few pounds, but actually find doing it very difficult. And I think this is a common experience, particularly in relation to alcohol. 25

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So there are these different kinds of advertising. I think, in the knowledge area, telling... giving people knowledge, as I've already explained, alerting people to dangers in particular is a relatively easy thing to do. Not as easy, in my 5 estimation, as ordinary brand advertising, but it is something that has been shown to work.

Although, even there, I remember again the seat belt campaigns some years back, the Government repeatedly spent many many millions of pounds on 10 getting people to wear seat belts and there were always little blitz in people wearing seat belts for the period after the advertising. So it did have some impact, but then, usually seat belt wearing sank back to the twenty-five percent (25%) of individuals who 15 really thought it was important. And then one day the Government decided that it should be unlawful not to wear a seat belt, and seat belt wearing went up to a hundred percent (100%), thereby demonstrating a rather simpler solution to the problem. And I think that 20 demonstrates quite neatly the pitfalls of those sorts of advertising.

Generic advertising is a different kettle of fish. Generic advertising, there are, I think, two (2) illustrations of the reason why it, in most cases, 25

simply doesn't work effectively.

First of all, if it was effective, many many more corporations would band together to do it. So we would have "Buy Furniture" campaigns, or "Buy Book" campaigns, or "Watch Television" campaigns, as well as 5
"Buy Eggs" or "Eat Eggs".

The agricultural surpluses one is particularly illuminating. We've had "Go to Work on an Egg" for many many years in the UK, and yet egg consumption has sunk continuously for, well, for most of the First War 10
period. The same is true of "Buy Bread", it didn't last. The bread manufacturers simply found it wasn't working. The same is true of tea. Tea consumption has been declining in the face of coffee for many many many years in the UK, the UK's traditional drink. The tea 15
blenders have instituted all kinds of campaigns, ranging from one insinuating that it would help you in various ways physically through to all kinds of other inducements to drink tea, but I'm afraid that poor old tea consumption continues to fall year-on-year. 20

So I think that there's a lot of solid evidence to demonstrate that although people have from time to time and still continue to try generic campaigns, they're not really worthwhile and they're hugely difficult to do successfully, in my estimation 25

virtually impossible.

In the rare... there are one (1) or two (2) examples, I think, where generic advertising appears to have popped up a product for a little while, but I think it's rather like seat belts, it might help it up 5 for a while, but has no long-term impact whatsoever because it's simply beyond the power of advertising to do these things sensibly.

People tend to make up their own minds about... about brands and their need about product categories, 10 they tend to decide whether they want to drink tea or coffee for themselves. They can taste it, they can sample it, they can try it, they will go to family and friends and do these things as well, and they simply decide that they're little by little preferring to 15 drink coffee than tea and no amount of advertising is going to persuade them otherwise.

69 Q- Mr. Waterson, in your report, at a later page, you make a similar reference to, not coffee versus tea, but to beer versus wine. Could you explain to the Court your 20 experience in that field?

A- This is a very interesting example, having particularly been involved in the drink market for quite a long time. The beer industry is a very big one in the UK, but has been in decline for some four (4) or five 25

hundred (500) years. Little by little, people are drinking less of it.

In the seventeen hundreds (1700's), they tended to drink beer, because drinking water was actually more dangerous and the quality of water was not good, but 5 there has...

THE COURT:

70 Q- It's still the case.

A- Quite. Consumption of beer has continued to trend downwards. Over the past twenty (20) years, the amount 10 of advertising spent on trying to get... obviously, this has been brand advertising, but the amount of brand advertising for beer has almost doubled, it has gone up very very substantially, more than doubled in fact from seventy-nine ('79) to two thousand (2000), 15 and this has had no impact whatsoever on the apparently continuing decline in consumption of beer.

As a result, the ratio of the amount spent on beer to the consumption of it has gone from less than one point (1.) up to two point two seven (2.27). They 20 are spending a great deal more per litre or per gallon of beer sold.

The same is true of the spirits market. People are drinking less and less spirits.

Me SIMON POTTER:

25

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71 Q- By "spirits" you mean hard...

A- I mean whisky, gin. Hard liquor I think you call it here

72 Q- Yes.

A- Exactly the same thing, ad spend has risen very sharply 5
but doesn't appear to have in any sense moved the
gentle decline in sales.

Wine, on the other hand, which is hardly
advertised at all, consumption has rocketed over that
same period from four and half million (4,500,000) 10
hectolitres to well over ten million (10,000,000)
hectolitres, enormous increase in wine consumption in
the UK, with almost no advertising, has in fact fallen
away because it's widely believed not to work at all in
that particular market. Obviously, there are problems 15
with wine branding, a lot of people... the
fragmentation as a Chateau bottled wine and so on. But
there have been brands established and the advertising
business seems to be very rentable, very useful. So,
I think it's very interesting, these are trends that 20
people who simply decided irrespective of the amount of
brand advertising around, they're going to drink less
beer, they're going to drink less spirits and having
seen the benefits of wine consumption in their foreign

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holidays, they are drinking ever more wine. I think this is particularly true because of the proximity of France, of course. But for whatever reason, these trends are taking place and even major changes in the total volumes of beer advertising and spirits 5 advertising and, almost always complete absence in contrast to wine advertising, that made no apparent difference to these trends as well.

Me SIMON POTTER:

10

My Lord, the paragraphs of the report, which speak of this, are just given for your reference, are 31 and 53 to 57.

73 Q- Now, you referred earlier, Mr. Waterson, to the case of a growing market for a new or little known product.15

A- Uh-huh.

74 Q- You referred to the video machines. This is mentioned at your paragraph 33. Is your evidence then that advertising, branded advertising for those kinds of products could stimulate overall demand? 20

A- Yes, I think it.... I've seen no direct evidence that this is the case, but it's clearly common sense that if people simply don't know a personal computer exists one day and they see an advertisement for an IBM personal computer the next, then it may stimulate them to go and 25

look at the market for personal computers. They may be intrigued.

I think that it takes very very little time for the presence of these products on markets to become generally known. There can be very few people today 5 that don't know the existence of the personal computer, and yet twenty (20) years ago it didn't exist, or at least it existed in a very different form to the way it does now.

Similarly with video recorders, the penetration 10 within the population grew enormously quickly, and I'm sure the knowledge that the video recorder existed grew even more quickly than that.

As these markets mature, as they become self-evidently in existence, the presence of advertising 15 simply becomes ordinary brand advertising, but in the early stages of these markets, it is entirely possible that they do attract people's attention and draw the attention of people to the existence of the product as well as the brand. But I do believe this is a very 20 special case.

75 Q- And at paragraph 34 of your statement, you refer to that special case in the second sentence. You say:

"Brand expenditure in aggregate is

*most unlikely to have an automatic
impact on consumption trends, unless
the product is really new and
revolutionary in nature."*

Is that the special case that you're talking 5
about?

A- That is the special case that I'm referring to, yes.

76 Q- Now, at paragraphs 50 and following in your report, Mr.
Waterson, you refer to some cases which you've
qualified as blindingly obvious. Why did you put those 10
in this report?

A- I think a lot of the critics of advertising frequently
refer to the fact that it's simply... that advertising
is there to sell, and therefore it must sell, and
therefore advertising of cigarettes is going to sell 15
cigarettes. This very simple identity is trotted out
over and over again by the critics of food advertising,
drink advertising, pharmaceutical, in all of the
various markets in which advertising exists.

And yet there are some cases where it is 20
absolutely self-evident it can't be that way. The
gasoline market, what we call petrol in Europe, the
gasoline market, people simply do not go and buy more
gasoline because they've seen an advertisement for it.

I think it's extremely unlikely that people wash more because they have seen a soap advertisement. I think it's extremely unlikely people will buy more tires for their car because they've seen a Firestone advertisement. I think it's extremely unlikely that 5 people use more toothpaste because they've seen a toothpaste advertisement.

And so I simply quoted these examples of areas where I don't think anyone could seriously suggest that advertising has... that brand advertising has the 10 accidental impact of augmenting the total market. It is possible, almost anything is possible in extreme cases, but I think it's just very very very unlikely.

77 Q- You mentioned the soap market. In fact, it's mentioned as well in your paragraph 51. Do you have an idea of 15 the amount of spending on advertising in the soap market?

A- I don't. I could certainly find out, but I don't have any indication of the total market size of the total amount of advertising money spent. I do know that soap 20 is a product, brands produced by major corporations worldwide, people like Proctor & Gamble and Unilever, and I do know that these are some of the most ferociously competitive markets of any kind. People do fight very very hard over these markets for extra 25

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points of brand share and they do spend a great deal of money. Proctor & Gamble is one of the world's very very large established advertiser and is also one of the world's great soap manufacturers, I believe, as is Unilever, in all its various forms, obviously washing powder and so on. 5

78 Q- And you've mentioned, Mr. Waterson, the gasoline and tires and so on, and that prompts me to ask you the question whether you make a distinction in the role of advertising for those products and the role of sponsorship by, let's say Firestone Tires? Is the role different depending on whether it's advertising or sponsorship? 10

Me MAURICE REGNIER:

My Lord, that's not the subject of Mr... anywhere in Mr. Waterson's report the subject of sponsorship. 15

Me SIMON POTTER:

My Lord, the Attorney General's position is that sponsorship is advertising, sponsorship is advertising. 20

Me MAURICE REGNIER:

Well, if you want to admit it, I'll allow the question. 25

Me SIMON POTTER:

I don't admit it.

Me MAURICE REGNIER:

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bit because, as you say in your report, you were asked to consider the definition of "lifestyle advertising", and you did so, beginning at paragraph 35 of your report. Can you tell the Court what it is you have found about the use of the term "lifestyle advertising" 5 in the advertising world and academic books?

A- Now, the first thing I did when asked this question was to do a word search, as one word, in the West Law database on the World Advertising Research Centre database, and we did indeed get lots of references to 10 lifestyle, but it was always in every case to lifestyle as in, "Old people have a very sedentary lifestyle".

I worked for what is called a geodemographic research company at one stage in my career and these people, these kind of companies specialize in 15 segmenting populations into different kinds of behavioural patterns, different kinds of lifestyle patterns. So, for example, some people have a very athletic lifestyle and some people have a very sedentary lifestyle. Some people go to see the cinema 20 a great deal, some people go running, people have many different lifestyles, and this is the very simple use in which the word lifestyle appears in the advertising literature in the vast majority of cases.

I couldn't find anywhere references to "lifestyle 25

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advertising" as it has... as it was referred to in the
court proceedings ten (10), eleven (11) years ago, the
sort of mountain stream beautiful young people kind of
advertising which I was shown, I think, advertisements
for at the previous proceedings. It's very obvious 5
that people are most... advertisers are most unlikely
to advertise anything using spectacularly dirty or
unkempt or ugly people. They do tend to, in general if
they're using individuals in advertisements, tend to
use the advertising to people who cook a lot, they will 10
have somebody that looks like a cook, but he or she
will not be a particularly unfortunate looking person.

There's a great deal of impact put on realism
these days. People used to try to advertise products
using film stars and things like this, and I think the 15
general feeling these days is that this kind of
advertising... that if you're advertising a humble day-
to-day product, it's better to do it in a realistic
situation.

Again, I have a little bit of personal experience 20
of that. When I worked for Guinness, the Guinness ads
were always of Guinness being drunk in rather nice
bars, frequently with nice views, always nice people,
always in beautiful Waterford glasses, which are shaped
in sort of odd shape, always with little trickles of 25

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perspiration running down the side showing the beer was very cool, and always with a beautiful big head on the top.

In actual fact, at that particular point in time, Guinness was mainly sold in very down market pubs, 5 never in Waterford glass, hardly ever with a proper head because the pipes weren't cleaned regularly, and never cold other than in Ireland itself. And so there was an enormous difference between how people saw Guinness in reality and how it was viewed on the 10 advertisements, and I think this kind of thing now happens much more rarely. People realize that there is no point in presenting your product in a situation which isn't relevant and directly useful.

So to summarize, I think that lifestyle 15 advertising simply isn't seen in the advertising business as a separate kind of advertising. There are many different kinds. One could categorize advertising. There are... a lot of advertising recently has featured puzzles of one sort or another, 20 and there are various different kinds and ways and methods of presenting your product.

But I don't believe lifestyle... I don't believe people sit around and say, "Let's have some lifestyle advertising here." There appears to be almost no 25

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literature on it, at least in my database, which, as I've said, I believe is the biggest of its kind in the world, and I don't believe that it is a very useful concept in analyzing the conditions that we're trying to analyze in this courtroom.

5

81 Q- Mr. Waterson, did you find any evidence in the work that you've done to show that any particular kind or sort of advertising, whether it's the lifestyle or a puzzle or a soap opera advertising, did you find any evidence that one particular kind of advertising is 10 more influential on the consumer than another kind?

A- No, and I think it would be totally... if it were to occur, that people were to regularly say, "Oh, lifestyle advertising or puzzle advertising is much more useful, it obviously works far better than some 15 other kind of advertising," then everybody would do it, that all advertising would tend to become that kind of advertising, and it would be self-defeating.

It's possible that in a competitive situation, people will use one kind of advertising rather than 20 another in a particular situation, so it might be that soap opera advertising tends to feature puzzles of one kind or another, but if it seen to be spectacularly successful, then all the other companies will start to use it and so it will be self-defeating, and you're 25

back to square one.

I don't believe that there is any kind... any particular kind of advertising that is seen as particularly useful or influential in any particular kind of situation. Advertising is... advertisers are 5 trying to fit the advertising to the product and the product to the market, very simply.

82 Q- And did you find in your work, Mr. Waterson, evidence
that there was a particular kind or sort of advertising
which, compared to other sorts, would have a greater 10
tendency to affect global demand rather than brand
preference?

A- No, I have never seen any evidence of that kind at all.

83 Q- Now, in your report, and this is at paragraph 45, you
use the term "*lifestyle targeting*" in the third line. 15
Can you say to the Court what you mean by "*lifestyle
targeting*"?

A- There is a great deal of targeting of advertisements to people with different lifestyles. For example, if you're selling running shoes, you're most unlikely to be targeting extremely old people, you're more likely to target your running shoes to possibly people with a very athletic lifestyle or maybe to weekend joggers, or to some other element in the market of people that use

shoes for these purposes.

You're most unlikely to not do that. Possibly,
a very obvious example is fishing. If you're
selling... try to sell material to people who fish,
you're most likely to look at the kinds of publications 5
they read, is the main daily newspaper in Montreal
something read by fishermen or would it be better to
approach them by reference to their use of fishing
magazines, and so on.

So you try to focus in on their lifestyles to 10
understand how they... what kind of media they consume,
the kinds of things they do, the times of year maybe
when they go fishing, and focus your advertising around
those very simple things. It's fundamentally a simple
form of market research that enables you to avoid 15
wastage, and this is really what lifestyle targeting is
all about.

84 Q- And when advertisers advertise let's say your running
shoes, are they selling, are they advertising always to
all prospective purchasers of your running shoes or do 20
they try to segment the market?

A- It's possible that someone might have a running shoe
that was... that they thought was appropriate to
everyone. But it would be nice and likely to work
these days where we really do have specialist running 25

shoes for people who are indulging in serious athletic, running shoes for people at school and specialist running shoes for people who do squash rather than badminton, or actually running and so on.

So, targeting of appropriate products to 5 appropriate audiences is one of the very fundamental things that major advertisers do these days. And, in any other way, it would be very wasteful.

85 Q- And does the advertiser, when he's offering advertising to the market, offer different kinds of advertising to 10 different segments?

A- I'm sure that it's true. It's likely that if you're advertising to students, you might focus on the cost, the cheapness, the cheapness of your running shoe. If you're advertising to professional athletes, you might 15 point out the fact that the world's greatest athletes all use your shoes rather than somebody else's shoes. So, by kind of advertising, I don't mean puzzle advertising or something else sort of advertising but you would, you would have your advertising message 20 focus on a particular kind of benefit that the shoe offers to a particular audience.

86 Q- Now, I think you're aware, Mr. Waterson, of the definition given in the Tobacco Act of lifestyle

advertising.

A- I couldn't repeat it *verbatim* but I believe I...

87 Q- It's here, at section 22, subsection 4. And the
definition is:

"Advertising that associates a product with or evokes a positive or negative emotion about, or image of a way of life such as one that includes risks...", and so on.

In your work, have you ever seen lifestyle ¹⁰ advertising spoken of in those terms?

A- No. I think it's probably true to say that almost all forms of human communication evokes some sort of reaction, no matter how limited. So, for example, let me think of an example. A lawyer's... I mean, where 15 the lawyers have brass plates in Canada, but in the UK most legal offices have, rather than a nice shiny, very plain rust plates outside with the names of the lawyers written on them. One might suggest that that is lifestyle advertising within the very large definition 20 that you just showed me. Brass plates will evoke images of dependability, solidity, conservatism, probity, all of those kinds of things that you want in a lawyer. And the emotion, the emotional reaction is

probably not very great, it may be simply a mild reassurance that you're not... not can turn off it's inhabited by cowboys, as it were.

And but even something as modest as a piece of brass with a name written on it can evoke reactions of 5 that kind. And I think all kinds of advertising will, if it's seen and if it's precious, and not simply ignored, which, of course, is the case for the vast majority of advertising, but almost anything, if it's 10 seen and looked and focused on by a person, will evoke some kind of reaction.

88 Q- Now, Mr. Waterson, it's time to change gears again and
I'd like to speak about the statistical side of your
work. And before doing that, ask a few questions of
preface before the eleven o'clock (11:00) break. 15

First of all, what kinds of statistics are there out there to look at when one is looking at consumption of either drinks or tobacco, what kinds of statistics might you look at?

A- There are many different mass markets, there are three 20
(3), four (4) or even more different kinds of
statistics. There are statistics produced by asking
people how much they consumed. There are statistics
produced via tax revenues, for examples, for alcoholic
drink, is particularly taxed in most developed 25

countries of the world and, therefore, in the UK, tax records, in London, revenue records for the amount of alcoholic drinks consumed, go back at least three or four hundred (3-400) years.

There are statistics produced by government departments by means of censuses of one kind or another, how many people claim to have a colour television, or whatever it is. And under it, there are figures based on basic forms of market research, which involves visiting people in their homes or stopping them in the street and asking them if they consume beer and, if so, how much they consume.

These different types of statistic often come to approximately the same conclusion, frequently not the same... normally, not the same conclusion. There will 15 be a variance, a dispersion in the figures that they produce. But I think that these are probably the main kinds of statistic that one can look at in the different individual major market of the world like tobacco, or drink, or food. 20

89 Q- And if we...

A- Ah! there is, I'm sorry, there is one other kind which is... which we do some of it, in fact, called data pooling where the major manufacturers get together and simply pool their individual brand figures in order to 25

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have an accurate description of total market size. So, that is a further kind of statistic. But that does not exist in some... in a lot of markets.

90 Q- And would you, in your work, when you are looking at consumption levels in a particular year, would you look 5 at smokers or drinkers claimed consumption?

A- One has to be careful with claimed consumption because, of course, particularly if you're interviewed at home in front of a spouse and you're... you have a tendency to drink a lot, one might well underclaim somewhat in 10 front of the interviewer, in front of your partner. So, statistics can be various, vary considerably and one does have to be careful with figures of all kinds. There is a famous old English phrase: "Lies, dumb lies in the statistics". And I think statistics can, 15 obviously, be manipulated unless they're properly understood.

One way of getting around that is to simply average figures, which is what I have done here, take the various kinds of figures that have been produced 20 and produce an average of the various estimates in order to hope to produce as reasonable an estimate as possible.

91 Q- And would you look, in looking at various countries consumption levels, at total consumption in the country 25

or would you look at *per capita* consumption, or would you look at *per drink* consumption? What is the most useful to you?

A- It depends what you're looking for, really. There are many different ways of looking at individual market 5
consumption figures. For something of... for the subject under discussion today, ordinarily, one would look at *per capita* consumption simply because, obviously, for a country like India, there would be little purpose in measuring tobacco or drink 10
consumption in a country like India, with pushing a quarter of the world's population with a country like Iceland, which has a tiny fraction, a few hundred thousand people.

So, one wouldn't compare if you're looking at 15
consumption, relative consumption levels, I think you would want to look at some sort of *per capita* consumption figures in order to extract some reasonable kind of comparison between countries.

92 Q- Well, My Lord, I'm about to embark on a series of 20
questions which hold together. Perhaps we could have our break now?

THE COURT:

Yes, we'll have a fifteen (15) minute break.

RECESS

THE COURT:

Yes?

Me SIMON POTTER:

5

Thank you, My Lord.

93 Q- Now, Mr. Waterson, at paragraphs 46 and following of
your report, you speak of further evidence coming from
the examination of the effect of actual bans. Can you
tell the Court what it is you did to prepare that 10
evidence and to look at it?

A- Initially, the evidence... the figures were simply
prepared not for this court at all, but for a document
called "*World Tobacco Trends*" which was published in
nineteen ninety-eight (1998) simply for... to be sold 15
to the tobacco companies in exactly the same way we
have world drink trends and world advertising trends.

So the data was compiled using a very simple
system. Looking at the various estimates of tobacco
consumption produced by obviously national data of one 20
sort or another sometimes, but not always, provided by
national statistical associations, sometimes by tax
authorities, there are at least two (2) research
companies that also produced tobacco sales data

internationally, the ERC company and the *Maxwell* company, and there have been various other organizations over the last twenty (20) years or so that have produced this kind of data.

We looked at data for individual countries and 5 realized that we couldn't produce a long run of data without using some method to tie the data together because, for example in some countries from nineteen sixty (1960) to nineteen seventy (1970) or from... various periods, one company only or a combination of 10 companies would have produced the data and then for subsequent periods it would be other companies.

In other words, on a world basis, it simply isn't possible to use one (1) source or even two (2) sources for producing world tobacco trend data. We found 15 ourselves obliged to try and join together series produced by different companies.

Happily, most of the series produced by most of the different sources do hang together very well. They're all pretty much of a muchness, although they do 20 vary for individual periods by... of the order of three (3) or four percent (4%) in some instances.

We therefore tied these figures together, as I say, as a commercial venture, not in any sense as part

of this trial, and produced very long run tobacco data stretching from nineteen sixty (1960) through to the year two thousand (2000), over a forty (40) year period.

When I was approached to produce information for this trial, we then looked at the data and saw that it was reasonable, in my estimation, it was of reasonable quality, sufficient quality to be used to show that over periods where advertising has been banned in some countries, there is no discernable pattern between advertising bans and tobacco consumption.

94 Q- Mr. Waterson, I'm sorry to interrupt you, but you said that you originally prepared this data for this book, "*World Tobacco 1998*", and said that that covers a span from nineteen sixty (1960), I think you said to two thousand (2000).

A- Yes.

95 Q- It must obviously have been till nineteen ninety-eight (1998).

A- Nineteen ninety-eight (1998). 20

96 Q- All right. And subsequently, after that book, you have prepared this Table 1?

A- We were going to produce a second volume of the book. The book was reasonably successful and we were going to

produce in the year two thousand (2000) a new version of the book, when investment in the Internet caused us to reassess our priorities and decide that producing a large number of market intelligence reports covering different industries wasn't the sensible thing to do at 5 that time, and so we did not.

We prepared, we in fact prepared the data for entry into an update of the book, but the book was never published. And I used the material that had been prepared to update the nineteen ninety-eight (1998) 10 book in preparation for this trial, although an update was done, I believe, last year to ensure that we had some more recent data available.

97 Q- Now, if we look at the table that you prepared, Table 1, we can see that it is entitled "*Countries Ranked by 15 Change and Per Capita - Cigarette Consumption Since 1975*". Can you explain the figure per capita cigarette consumption?

A- This is simply total consumption divided by the total number of people in each country to give some rough 20 idea of per capita consumption.

98 Q- And when we look at Table 1 and see the column entitled "*Percent Change*", what is that percent change?

A- That is simply the percent change between the two (2)

years used. The two (2) years were chosen not entirely arbitrarily, but they could equally well have been other years. We chose the year nineteen seventy-five (1975) as a base partly because of the much advertised Norwegian tobacco advertising ban which took place in 5 that year, and we have simply... the figures simply illustrate the movement in tobacco consumption in various countries since that date.

99 Q- Now, we see as well the column entitled "Rank", and you've mentioned Norway. If we just look at Norway, I 10 can see it's country number 9 in the list. What does the number 9 signify in your list?

A- That of the countries for which we had at least... the countries weren't chosen randomly, they were simply the countries for which we had data that seemed to be 15 reasonably useful. And that number 9 simply signifies that tobacco... that cigarette consumption, I'm sorry, cigarette consumption in Norway rose more than any other than the top eight (8) countries. It was the ninth increase in per capita consumption over the 20 period.

100 Q- So, can we summarize for the Judge, using the example Norway - I'll take the liberty of leading you a little bit, I think there's... - from nineteen seventy-five

(1975) to two thousand (2000), is it that your data show an increase in cigarette consumption per capita in Norway of thirty-nine point seven four percent (39.74%)?

A- That's what the table shows.

5

THE COURT:

101 Q- And rank 9 is what?

A- I'm sorry? Number 9 is the rank, the rank in terms of the numbers of the countries. Nigeria showed the highest growth.

10

102 Q- Okay.

A- And Norway the ninth biggest.

103 Q- Okay.

Me SIMON POTTER:

104 Q- And this is from the year nineteen seventy-five (1975), 15 the year of the Norwegian ad ban, is that right?

A- Yes, that's correct.

105 Q- Now, you state in your report, Mr. Waterson, that... let's just make sure we use your words...

THE COURT:

20

Paragraph?

Me SIMON POTTER:

106 Q- It's in paragraph 47 in your report. You say that:
"As appears from the table, there have

*been declines in consumption in
countries without an ad ban, and
increases in consumption in countries
with an ad ban."*

Can you explain that statement to the Court? 5

A- There have been quite a few countries where one form of
total advertising ban that has been in place over the
period, and in some countries that have had an
advertising ban, for example in New Zealand, there have
been quite dramatic falls in tobacco consumption. 10

So for example, if we look at number 57 in the
rank, we have New Zealand which enforced a tobacco
advertising ban, I believe, in nineteen ninety (1990),
and as seen in here, sixty percent (60%) fall in
consumption. 15

107 Q- Since seventy-five (75).

A- Since nineteen seventy-five (1975). We have other
countries very close to it in the list. We have the
UK, which has seen a dramatic fall, the US which has
seen a dramatic fall, which haven't had an advertising 20
ban. Conversely, there have been some countries that
have had an advertising ban for many many years, for
example France since nineteen ninety-two (1992)...

108 Q- Which number is France?

A- France is 34 from the list. Which has seen only a very modest fall in consumption. We can see Germany, which has no ban, which has seen a small rise. We can see Italy, which has had a ban in place since nineteen sixty-two (1962), where there has been... consumption 5 effectively has been almost flat. And then there are some countries further up the list where there have been advertising bans for many years, like Thailand, since nineteen eighty-nine (1989)...

109 Q- Thailand is number what? 10

A- Number 7. And Portugal, number 12, where there have been very significant increases in consumption despite an advertising ban. For example, Portugal banned tobacco advertising in, I believe, nineteen eighty-three (1983), and has seen a twenty-seven percent 15 (27%)... twenty-eight percent (28%) increase.

THE COURT:

110 Q- But... I'm sorry, sir, you're referring to ban, but is it... placed where in your report where...

Me SIMON POTTER: 20

It is not written on this table, My Lord, and so the witness is explaining this to you.

THE COURT:

Yes, but do you have a document...

Me SIMON POTTER: 25

No...

THE COURT:

... saying that there...

Me SIMON POTTER:

... it's very easy to prepare one, which will 5
mirror the testimony of the witness to say where the
bans are.

THE COURT:

I guess we'll need it.

Me SIMON POTTER:

10

Well, that's very easy to, easily done, My Lord.
We will do that. You will have that immediately after
lunch, My Lord.

111 Q- Now, if we go back to paragraphs 47 and 48, you then,
in the text of your report, refer to a particularly 15
sharp contrast, and the contrast you draw is between
Norway and the United Kingdom. Why was it you chose
that contrast?

A- Countries such as Norway, it says in this estimate, and
I would group certainly a few other countries in that 20
bracket, countries where they really made a very very
significant effort by not just banning advertising, but
by raising price very considerably, by stopping smoking
in public places, by very considerable health education
campaigns, by bringing together a lot of effort of 25

different kinds, notably price rises, to try and stop people smoking, whereas there are other countries, such as the UK and the USA, where advertising has been allowed to continue.

In some cases, in almost all developed countries, 5
there have been obviously health education campaigns and campaigns targeted at children. I remember my children coming home from school many many years ago and telling me that it was stupid to smoke, for example. 10

So there have been efforts in many countries, but I think particularly in countries like Norway, there have been efforts to create what has been called "*a no-smoking generation*". There have been efforts to... there has been a belief that by banning advertising and 15
increasing price and doing other things, they would simply stop young people smoking, and thereby create a total absence of smoking as those young people became older.

And I believe that that simply hasn't happened. 20
There is in fact evidence, very strong evidence from various places that consumption amongst young people today in Norway and other such countries is higher than it is in the UK, which really suggests that the

campaign has failed rather badly.

112 Q- Mr. Waterson, among the countries listed in here, I see one, which is country number 55 in the ranking, Serbia Montenegro, is there something you'd like to tell the Court about that number? 5

A- I think the Serbia Montenegro country... possible country crept in without my noticing. It is the old Yugoslavia and I found out this morning in a conversation to the UK that those figures do in fact tie together the old Yugoslavia data and the new Serbia 10 Montenegro data, which I think in retrospect I would have left out because Yugoslavia was split into various chunks, and Serbia Montenegro was only the part of what used to be Yugoslavia, so in that particular case, the comparison is probably unfair. 15

In any case, I wouldn't... given the events in Serbia over the past ten (10) years, I think it would probably be not a sensible place to draw comparisons from it in any event.

113 Q- Now, in preparing this table, did you take into account 20 the other conceivable factors affecting consumption that you have mentioned? Did you take into account price rises?

A- No, there has been much discussion of how one should set about measuring the impact of advertising bans both 25

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in the tobacco area and in the drink area and other areas. Undertaking a completely comprehensive survey covering the main developed countries of the world and other places where bans exist and going into the kinds of detail necessary to try to measure, using 5 econometrics, the impact of health education bans, the impact of price rises, the impact of the numerous individual effects which differ, of course, across countries, would be very difficult, enormously expensive and a task demanding years and years of time. 10

That was clearly beyond my agreement and indeed beyond... I don't wish to devote my life to these things. So it wasn't a possible alternative, but I do feel that the ranking that I have supplied, were there to be any real justification for an advertising ban, 15 were there to be any pronounced impact whatsoever, I do believe that the countries that have banned advertising would cluster more neatly together. At the moment, they are totally distributed through the universe of the countries I have listed, the countries for which 20 data is available over a long period of time.

There is no obvious clustering of the ban countries, for example amongst those where consumption has declined sharply, but there are a number of countries in which consumption has declined sharply 25

which don't have an advertising ban and indeed a number of countries which do have an advertising ban in which consumption has clearly risen.

So I do believe that although negative conclusions can be drawn from this, it is fair to say 5 that if advertising bans had a substantial impact, it would show up much more clearly in this table, there would be some form of pattern that emerged.

114 Q- And you say at paragraph 49 of your statement that a significant amount of statistical evidence supports the 10 thesis that brand preference advertising does not affect total consumption, is that how you see this table, Mr. Waterson? Does this table prove that advertising does not affect overall consumption?

A- No, I don't think it proves anything. I think the 15 accumulation of evidence from other statistical studies, for example the statistical studies that... done by Health Canada following the relaxation of the advertising ban in Saskatchewan, the various other statistical surveys that have been done worldwide, I 20 think altogether it presents a coherent picture of one where advertising bans don't really have much impact on consumption.

115 Q- You say that: "Supports the thesis". What do you mean by that?

25

A- It supports the thesis that brand advertising is directed at getting the hand in this market to move from one product to another. It supports the thesis that brand advertising is a very different thing and a very much easier thing, albeit difficult in itself to do than to get... than changing people's habits and major consumption trends. It supports the thesis that brand preference advertising simply does what it was intended to do: that is support brands and that it simply doesn't have the power to do much more than that.

116 Q- Now, before leaving this table, save for the document which we will have to the Court after lunch. The table is entitled "Cigarette Consumption", whereas the Tobacco Act deals with advertising for all manner of 15 tobacco products, for example: cigars and pipe tobacco, and loose tobacco for rolling your own cigarettes. Does your table take into account those products?

A- No, we deliberately decided to ignore all of those 20
other forms of tobacco on the simple grounds that only
manufactured cigarettes are usually heavily advertised.
Only in the manufactured cigarette category do you find
a lot of advertising expenditure devoted to brand

advertising.

I don't remember saying very much, or I know that there has been very little advertising in the UK and in many other countries for the forms of tobacco, given the fact that this was about the... this trial is about 5 tobacco advertising, so, is about the impact of advertising on tobacco, I thought it most appropriate to simply constrain the analysis to various elements of the tobacco industry that are heavily advertised.

117 Q- Now, in the United Kingdom, you've mentioned that in 10 your report as being a country without a ban, does that mean that are no restrictions at all on advertising in the United Kingdom?

A- Not at all. There are restrictions on tobacco advertising as there are on drink advertising and food 15 advertising and most other kinds of advertising in virtually all developed countries of the world and, indeed, in many of the less developed countries of the world. And there are many restrictions on what you can and cannot do with advertising in the UK and the need 20 on advertising in the UK.

118 Q- But in the UK, where do we see tobacco advertising?

A- It's in the press, it's on hoardings.

119 Q- What are hoardings?

A- Affiche, affichage.

25

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120 Q- Yes.

A- Or something like that, yes. It is not in any broadcast medium, basically, but it's pretty much everywhere else.

121 Q- And you have a figure for the United States, is 5
advertising the same in the United States?

A- I believe the press advertising in the United States is still allowed, but again, broadcast advertising basically has been stopped. I think broadcast advertising was stopped quite a long time ago in most 10
of the developed countries.

122 Q- Alright. Now, you refer in... I'd like to bring you, Mr. Waterson, to the conclusions which you give in your report, which are at page 2. And if you could take those conclusions, Mr. Waterson, and explain to the 15
Court how you based those conclusions, one by one. If we take conclusion number 1.

A- I think the advertising of branded goods can fairly clearly be seen to be all about selling individual branded products, individual brands within product 20
categories. The brand advertising does not, in the vast majority of cases, by "the vast majority" I mean ninety-nine point nine nine (99.99) recurring, in the vast majority of cases, does not seek to expand the total market. In exactly the same way one doesn't try 25

and motivate or move the entire market for second-hand cars, when you are selling your second-hand car. It is simply beyond the power and beyond the commercial realities of the situation.

Neither do I think that the advertising of 5
branded goods, accidentally, as a by-product if you like, influences total markets. I think there is a great deal of evidence from all over the world, in many different markets, that this does not happen. There are one (1) or two (2) areas, as we've touched on 10
generics and so on where there have been deliberate attempts to use advertising collectively to move product areas, and even in these areas, it does not seem to have been efficient as evidenced by the fact that it hardly exists outside of very, very few tiny 15
areas.

So, I think that there is very : 1 and strong evidence that the advertising of manufactured branded goods doesn't have any impact, really, on the overall levels of consumption of products in general and 20
tobacco in particular with the sole exception of the area of brand new inventions like PCs and VCRs.

123 Q- And if we jump from one... from conclusion number one (1) to conclusion number three (3), you say the empirical evidence does not demonstrate any correlation 25

between changes in consumption patterns. By saying that, are you referring only to what is in table 1 or are you referring to other evidence?

A- You know, there is a great deal of evidence. For example, the article that the research by Health Canada 5 into the impact of the drink advertising ban in that area of Canada. There are many other instances like that, there are many reviews... for example of the Addiction Research Foundation in Canada, came to the conclusion that bans on advertising didn't influence 10 sales of alcohol.

There are many collective studies looking at the bans in advertising of tobacco worldwide, which have concluded that these bans had no impact. There have been a lot of different ways of looking at the 15 empirical evidence and I... it is my strong belief, based on both the work I've done and the work of others, that this does not have... that this shows relatively clearly, as clearly as one can in an area like this, that there is no relationship between the 20 advertising of tobacco products collectively and sales.

124 Q- Mr. Waterson, you've just mentioned the studies of others. I'd like to draw your attention to your paragraph 32, where you refer to Martyn Duffy and you provide a quote from his nineteen ninety-six (1996) 25

publication. Is that one of the studies that you're referring to?

A- Yes, I've submitted to the Court a significant number, not enormous, but ten (10) or so of the major articles that have appeared over... in recent years, looking at 5 areas like, not just at tobacco but looking at the tobacco industry and its advertising effects of the food area, of the drink area, wines and spirits and, indeed, some articles that have been published, looking at total public demand and advertising in a much wider 10 context, not just in the narrow confines of those areas.

And I think the vast majority of this evidence, the serious work that has been done does suggest that there is no evident link between the advertising 15 collectively, brand advertising collectively and sales, collectively, of an industry.

125 Q- My Lord, Mr. Waterson has just said that he supplied it to the Court. The fact is he supplied it to us and we supplied it to the Attorney General, the 20 Attorney General has the documents to which Mr. Waterson is referring.

Me MAURICE REGNIER:

Do you plan to file it?

Me SIMON POTTER:

25

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I propose... if you would like to, please go ahead.

Me MAURICE REGNIER:

But did you plan to file it?

Me SIMON POTTER:

5

I don't.

Me MAURICE REGNIER:

Okay.

Me SIMON POTTER:

But you please feel free.

10

126 Q- And if we move to your conclusion number 2, Mr. Waterson, could you just give the summary of your position on that to the Court.

A- I don't believe that the term "*lifestyle advertising*" has any particular meaning amongst professionals, 15 certainly, in the industry, and I have been unable to find a clear definition that's accepted by academics either. I don't believe that professionals use the term on a regular basis to indicate a particular kind of advertising. I don't believe that there is any 20 coherent professional literature certainly amongst users of advertising on this area.

I do believe that it is used very extensively in the professional advertising circles to mean something

quite different from the definition that was meant in the trial... that was used in the trial ten (10), twelve (12) years ago. That is to say I believe that when people talk about lifestyle, they simply talk about market categorizations of old people, or people 5 who run, or people who engage in fishing, or play bridge, or whatever it is.

127 Q- Well, My Lord, those are my questions and I offer Mr. Waterson to the Attorney General.

THE COURT: 10

Thank you. Cross-examination.

Me MAURICE REGNIER:

I don't know, My Lord, what kind of list my friend wants to prepare concerning the advertising bans, but if he could put the date in which these bans 15 came into force, this would be highly appreciated and will maybe shorten the cross-examination of the witness.

Me SIMON POTTER:

It's a very easy thing, My Lord, it's very easily 20 found in the WHO documentation, and we will have that done immediately. We could run through it now, if you like, Mr. Waterson has all that information, or the document can be ready immediately after lunch.

Me MAURICE REGNIER: 25

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
EXAMINATION

Well, do you want to continue your examination on
that topic?

THE COURT:

As far as there's no document in front of the 5
Court, it's pretty hard for me to...

Me MAURICE REGNIER:

We'll wait for the document, My Lord.

THE COURT:

So you'll provide the Court with that document at 10
two fifteen (2:15), is it?

Me SIMON POTTER:

Yes.

THE COURT:

Thank you. 15

Me SIMON POTTER:

Will that be sufficient, My Lord?

THE COURT:

Yes, of course.

Me SIMON POTTER: 20

Yes, yes, thank you.

THE COURT:

Let's start with another topic.

CROSS-EXAMINED BY Me MAURICE REGNIER 25

on behalf of Defendant:

128 Q- That's your opinion, sir, that the figures used in
Table 1 are, to the best of your knowledge, reliable?

A- I believe so. They were... they were developed, as I
said, in line with the systems that we use for 5
producing figures for other industries, and I believe
that they are a reasonable... that they're used...
they're developed... they are produced using a
reasonable system of averaging and joining together
series to give a reasonable indication of what has 10
happened in those areas.

These... it must be said that all forms of
statistical edition using different time series and
joining them together have pitfalls, but I do believe
that a lot of care and attention has been put into 15
these figures and they have been checked.

129 Q- And obviously, the conclusion you're drawing from these
figures depends upon the reliability of these figures
as well?

A- It does indeed, as it does with all references to 20
market data in all industries, yes.

130 Q- If the figures are false or incorrect, well, the
conclusions are necessarily flawed?

A- That would be the case.

131 Q- You mentioned the Court that these figures come from... 25

that's a summary of the figures which are detailed in a document called "*The World Tobacco Trends 1998*".

A- That's... these figures have been updated. The nineteen ninety-eight (1998) book was prepared for sale to the tobacco industry in nineteen ninety-eight (1998) 5 or thereabouts, but these figures are updated from those. These are new series which were developed originally for the further book that was going to be produced in two thousand (2000) or two thousand and one (2001), but which actually... I mean I have the figures 10 that were produced but I haven't made... the figures have actually not been published because the company changed direction over that period.

132 Q- Is there a reason why these figures were not given to us prior? 15

A- I thought they had been given to you, actually.

Me SIMON POTTER:

Is there a reason why what? I don't understand the question.

Me MAURICE REGNIER: 20

If I understood the witness' answer, there are some figures that exist which we do not have or which were available to him while he prepared this... for the preparation of his Table 1. I just want to be sure

exactly what we're talking about.

Me SIMON POTTER:

If you can look at Document A-111 on our Rule 15,
and, My Lord, we have answered every question the
Attorney General has had, including request for 5
documents and background documents, and articles, I
don't understand the question.

Me MAURICE REGNIER:

Well, maybe I have difficulty with the answer.

133 Q- So maybe would you please repeat where do these figures 10
come from, from which document can we see the detail of
these figures?

A- A document we prepared which is... which, on my copy,
is called "A-111", and which included all of the
background data used in... not all of it because all of 15
it would have been a monumental amount of information,
but all of the basic series that we used to draw this
conclusion have been documented, as far as I'm aware,
before the Court.

134 Q- Did you personally review the figures to be sure that 20
the collection of this data was accurate?

A- I have...

135 Q- I'm sorry, starting from the original sources?

A- I have had a small team of researchers go through the

MICHAEL JOHN WATERSON (EXPERT)
PLAINTIFFS
CROSS-EXAMINATION

Me SIMON POTTER:

Yes, that's fine, that's a very good solution, I
think.

Me MAURICE REGNIER:

I think our discussion will benefit from the 5
benefit, they had to be prepared by Mr. Waterson
THE COURT:

Two fifteen (2:15) or two...

Me SIMON POTTER:

Two fifteen (2:15) is fine, My Lord. 10

THE COURT:

Two fifteen (2:15), that's great.

RECESS

15

L'an deux mille deux (2002), ce vingt et unième (21^e) jour
du mois de janvier:

LA COUR:

Tout le monde est là?

5

Me SIMON POTTER:

My Lord, as promised, we have prepared the Table
1 incorporating Mr. Waterson's testimony about the year
of the advent where that applies.

THE COURT:

10

So I guess it will be part of P-35, isn't it?

No?

Me SIMON POTTER:

36.

THE COURT:

15

36, sorry. 36, yes.

Me SIMON POTTER:

We can either make it part of P-36 or... that's
fine with me.

LA COUR:

20

Oui, on va le mettre dans P-36.

Me SIMON POTTER:

On va l'incorporer à P-36. C'est bien.

THE COURT:

Something else?

25

Me SIMON POTTER:

Nothing from my side, My Lord.

THE COURT:

Thank you, sir. Alors, maître Régnier, heureux?

Tout va bien?

5

Me MAURICE REGNIER:

Toujours, Votre Seigneurie.

THE COURT:

So far so good?

Me MAURICE REGNIER:

10

Toujours. Toujours.

In the year of Our Lord, two thousand and two (2002) on this
twenty-first (21st) day of January, PERSONALLY CAME AND
APPEARED:

MICHAEL JOHN WATERSON, witness already heard,

5

WHO, after having made a Solemn Affirmation, doth depose and
say as follows:

CROSS-EXAMINED BY Me MAURICE REGNIER

10

on behalf of the Defendant:

136 Q- So, if I understand well, sir, the data used to prepare
Table 1 comes from this document A-111. That's what we
sorted out during lunchtime. Now, if you take this
document A-111...

15

Has it been separately filed?

Me SIMON POTTER:

Not as an exhibit, no.

Me MAURICE REGNIER:

No?

20

THE COURT:

It's part of P-36.

Me MAURICE REGNIER:

Pardon?

25

THE COURT:

It's part of P-36.

Me MAURICE REGNIER:

No, it's not.

THE COURT:

5

This document or another one?

A- We're talking of a different document now, My Lord.

137 Q- Okay. Okay, it wasn't filed. It wasn't filed.

Me MAURICE REGNIER:

So we shall file it as D-34.

10

THE COURT:

And what is it?

Me MAURICE REGNIER:

Well, "*Tobacco Trends 1998 - and 2000*" .

THE COURT:

15

Do you have a copy for the Court?

Me SIMON POTTER:

I haven't come prepared, I wasn't going to file
it. Do we have an extra copy? Can I... it's easy to
make a copy, My Lord.

20

THE COURT:

I just want to get a copy for me, but it's up to
you.

Me SIMON POTTER:

come from "*World Tobacco Trends 1998*", as is obvious from the document. The next page, page 19, is Table 1 that you know about and it's all the pages after that which are the country-to-country backup numbers for Table 1, and that does not appear in "*World Tobacco Trends 1998*". 5

THE COURT:

So we'd better get two (2) separate quotes or...

Me SIMON POTTER:

I think it would be less misleading to do it that 10 way.

THE COURT:

Maître...

Me MAURICE REGNIER:

Well, that's a document... that's the way the 15 document was presented to us.

Me SIMON POTTER:

I quite agree, Maître Régnier, and I apologize if there's been any confusion, but the fact is the first four (4) pages explain, as you requested, the source of 20 the Table 1 and explain as well, as you requested, the background numbers for each country. The fact is those first four (4) pages are taken from a different document than the subsequent pages, that's all.

138 Q- Now, if you go to the chart on Canada...

THE COURT:

So, what page is it?

Me MAURICE REGNIER:

C'est en ordre alphabétique.

5

LA COUR:

C'est par ordre alphabétique?

Me MAURICE REGNIER:

Oui.

LA COUR:

10

Entre la Bulgarie et le Chili, oui.

Me MAURICE REGNIER:

139 Q- So the first column would be the year, second column
represents total consumption for cigarettes, that's
correct?

15

A- That's correct.

140 Q- If we go to nineteen ninety-one (1991), nineteen
ninety-two (1992), nineteen ninety-three (1993),
nineteen ninety-four (1994), we see the annual change
in nineteen ninety-one (1991) from nineteen ninety 20
(1990) was minus twelve point one percent (-12.1%),
that's right?

A- Uh-huh.

141 Q- Then nineteen ninety-one (1991) compared to nineteen
ninety-two (1992), there's a decrease in consumption of 25

ten point eight percent (10.8%). Nineteen ninety-three (1993), a change from nineteen ninety-two (1992) to nineteen ninety-three (1993) of seventeen point three percent (17.3%). And then, suddenly, nineteen ninety-four (1994), we have an increase in consumption in 5 Canada of sixty-one percent (61%).

THE COURT:

What is the question?

Me MAURICE REGNIER:

142 Q- Is that really the situation that occurred in Canada in 10 nineteen ninety-four (1994), sir?

A- I understand, and I have re-checked these figures several times, that all four (4) of the sources that we used to look at these figures confirm that there was a major increase in the statistics for the year nineteen 15 ninety-four (1994). I believe it was something to do with the situation that prevailed before then. The major drops, I understand, were to do with the smuggling of tobacco, and I believe the Canadian Government did something to stop the smuggling and the 20 tobacco consumption figure rebounded to where it would have possibly been before.

But I now stress that I have made no attempts to understand these figures. I have simply taken the official figures or the figures from the various 25

consumption. I believe that the major falls before that are as it were a precursor to the major increase. The falls were false ones because they were falls in consumption due to smuggling and then the corresponding rise at the end was effectively a false one. But, 5 simply, the series returned to its earlier normality, as you can see, if you ignore that blip in those four (4) years.

I do believe that the most accurate figures that I could find, and I do believe that if one ignores the 10 blip in those four (4) years, there is a reasonable trend for consumption in Canada shown by the overall data.

146 Q- Now, you're giving the example of Canada in which the smuggling issue would have been resolved in nineteen 15 ninety-four (1994). Are there any countries where the smuggling issue is continuous and permanent?

A- I simply don't know that, I'm not an expert in smuggling of tobacco. I know that tobacco smuggling is a serious issue in some countries, but I don't know 20 particularly where they are. I understand, in the UK for example, a significant number of cigarettes crosses the sea from France because tobacco is significantly cheaper in France. But I wouldn't dream of putting a precise figure on it for obvious reasons. 25

147 Q- If I would suggest to you, sir, that twenty-five percent (25%) of cigarettes consumed in the UK come from smuggling channels, would that be correct?

A- I have no idea, as I said, I'm simply not an expert on smuggling statistics. I think you'll probably have to 5
consult the customs authorities and I don't believe I've heard a figure as high as that ever mentioned. I do believe that cigarettes are smuggled across the Channel, I do believe that ordinary people bring back... smokers bring back as many cigarettes as they 10
can, for obvious reasons, when they go to France. But I wouldn't care to put a precise estimate on it at all.

THE COURT:

148 Q- They bring wine also, isn't it?

A- They also bring wine, they also bring spirits, whisky 15
comes back home as well. So, it's... through all the peculiar system we have agreements on.

Me MAURICE REGNIER:

149 Q- Now, if we go back to China, for example, there's an increase in one hundred and forty-seven percent (147%) 20
in tobacco consumption. Do you know whether or not there's a problem of smuggling in China?

A- I simply don't know. China is a huge country with an enormous population. I would imagine that it would be very difficult to smuggle into China enough tobacco to 25

make a significant difference, simply because of the enormous population. But I simply couldn't comment, I don't know what the situation is in China.

150 Q- Are you familiar, sir, with the United States Department of Agriculture data on tobacco consumption 5 in various countries?

A- Yes, indeed.

151 Q- Just a moment, My Lord.

I have a copy, sir, of the USDA report on China for the year two thousand and one (2001). You are 10 familiar with these reports of the USDA?

A- I've seen these reports, yes. And, indeed, many of the USDA figures appeared as one of the figures, one of the contributory figures to the figures that I produced.

152 Q- If you turn to page 1 of 18. 15

The Court has a copy.

THE COURT:

Sorry, what page?

Me MAURICE REGNIER: 20

1 of 18.

THE COURT:

Yes. Uh-huh.

Me MAURICE REGNIER:

153 Q- The first paragraph reads: 25

"The general condition of China's tobacco industry appears to have improved, with increase profitability for cigarette companies, despite some backsliding on production limits. Nonetheless, the industry's problems remain significant. Despite an aggressive crackdown, illegal cigarette production continues to be a major headache undercutting legal sales and evading taxes. Smuggling also continues to be a problem, and recent statistics indicate that illegal imports may be on the rise".

5

10

Isn't it a fact, accordingly, that your figure, 15
the figure that you have in Table 1 on China, are for
the least to say inaccurate?

A- This, I don't believe that the figures that you got
here necessarily contradict. We have, for China, I
believe, used some of the private estimate which 20
circulate from Maxwell and from other research
companies and it is entirely possible those research
companies have taken into account some smuggling. I
simply wouldn't know. I do believe that this, in a

country of a thousand million people, or whatever it is, it would be very difficult to smuggle a huge amount, a large proportion of the market, for obvious reasons. But I simply comment on the figures other than from that of layman perspective. 5

154 Q- Well, may I suggest that's pure speculation on your part, sir.

A- The population of China is vast and is not speculation. To smuggle enough tobacco across the borders of a country with a large military presence to satisfy the 10 demand of all those, or a significant proportion of those people, would presumably require endless truckloads going through. China has got an awful lot of people and if more than a tiny proportion of them smoke, it would be very difficult to smuggle 15 significant amounts of tobacco in.

But, as I say, I'm not an expert and I can't comment. It is, I would have thought, a common sense reaction but I certainly can't be precise.

155 Q- Well, I was being, sir, speculating on Maxwell, not on 20 the situation in China. Because you just told us that you were not aware about the smuggling issue in China and then you tell the Court that the... well, Maxwell may well have taken account of.

A- We have used... I can't say that we have used private 25

estimates in the construction of the Chinese figures.
We haven't used any Chinese Government figures, as far
as I'm aware, we certainly haven't for this particular
document and that may be, it's conceivable, it is a
speculation because I don't have the figures in front 5
of me, although I could find them. But it is possible
that the private research companies, which compile
these figures, have attempted to take account of
smuggling if it is a major activity, but I can't say
for sure. 10

156 Q- But the answer is that you don't know.

A- I can't tell you that the figures that I have used are
those which are used by the tobacco industry itself, in
looking at market conditions in these areas. And,
therefore, likely to be the most accurate available 15

157 Q- So, My Lord, I'd like to file the USDA report on
China as Exhibit D-...

THE CLERK:

35.

Me MAURICE REGNIER:

20

158 Q- Now, I'd like to draw your attention to the situation
in India. Do you know what is the percentage of
cigarette consumption in India, by comparison to other
products, other tobacco products?

Me SIMON POTTER:

25

Objection, My Lord, I'm afraid I, myself, don't understand that question. Before the witness answers, we should understand what the question is.

THE COURT:

Could you repeat the question, please?

5

Me MAURICE REGNIER:

159 Q- Yes. Of the total consumption of tobacco products in India, what is the percentage represented by cigarette, manufactured cigarettes?

A- I simply don't know. For this particular report, I 10 thought the best way of presenting the figures was to look only at manufactured cigarettes because it is manufactured cigarettes that carries the advertising. Most other cigarette... most other smoking materials don't usually be... are advertised a lot. And, 15 therefore, although it is a... it was a judgment, which may not be necessarily the best possible one, that seemed to me at the time, that restricting the report to manufactured cigarettes, which would be advertised in some countries and not advertised in others, would 20 be the best way of presenting the data.

160 Q- If I am to tell you, sir, that only twenty percent (20%) of the total tobacco consumed in India is in the form of cigarettes, would that surprise you?

A- It would neither surprise me or not surprise me, it's 25

entirely possible that that is the case. How one would, of course, account and measure the smoking materials that are not manufactured and how one would count the smoking materials that are produced in cottage industries and things of that sort in a country 5 the size of India so that one could make a precise estimate would, of course, be surprising to know.

161 Q- I'd like to show you, sir, a document which comes from the CDC, Centre for Disease Control, which is a reproduction of what appeared in the *World Tobacco* 10 *Profiles* prepared by the WHO. Are you familiar with this kind of document?

A- No, I haven't seen this one before.

162 Q- I would ask you to read the paragraph of the first page about tobacco consumption, and to tell me whether you 15 consider this statement accurate or not.

A- How one would find out how much tobacco is consumed in hookahs and the other forms of smoking systems that are referred to here, I simply wouldn't know. I would suspect that it's actually extremely difficult to find 20 an accurate estimate for the amount of tobacco consumed in those ways in a country like India. But if this is a report from a body connected with the tobacco industry or from some central statistical agencies, I

would accept that it is possibly a legitimate estimate, but it would be necessary to know a great deal more about how these figures have been derived, I think, before suggesting that that figure was accurate.

163 Q- But at least this casts doubts, serious doubts as to 5
the accuracy in your report, the conclusion you draw from the figures that appear in Table 1.

A- Could I ask where actually these figures came from? Are they from a recognized market research company serving tobacco industry, or are they from a recognized 10
government agency, or are they from some other form of agency?

164 Q- They come, sir, if I may answer your question, from the CDC, Centre of Disease Control. Are you familiar with the United States Centre of Disease Control? 15

A- No, I'm not.

165 Q- Okay.

A- So it's not from anything related to a tobacco or a government agency.

166 Q- I'd like to draw your attention to Norway, which you 20
cite as being an example of total ban.

THE COURT:

I'm sorry, what country?

Me MAURICE REGNIER:

Norway.

25

THE COURT:

Yes.

Me MAURICE REGNIER:

167 Q- In which, according to your chart, Table 1, there's
been an increase of thirty-nine point seventy-four 5
percent (39.74%) in cigarette consumption since
nineteen seventy-five (1975), that's correct?

A- I believe that's correct.

168 Q- Isn't it a fact, sir, and I think that you are fully
aware of this since you testified on this issue in the 10
very first trial, that most of tobacco products
consumed in Norway are under the form of what they call
"roll-your own", *tabac à rouler*?

A- I believe this used to be the case, and I believe it
was certainly the case thirteen (13) years ago when I 15
testified previously. I'm not sure it is the case now.
I believe that manufacturers of cigarettes have taken
a much bigger section of the Norwegian market over the
past fifteen (15) years.

169 Q- Did you verify these figures recently, sir, before 20
preparing this table and putting it before us?

A- I haven't verified the figure because I had come to the
conclusion that the only satisfactory way of looking at
all of these cross-country comparisons was by

restricting the analysis to cigarettes alone.

170 Q- So you have no idea, sir, of the trends, the
consumption trends in roll-your own in Norway?

A- Consumption of roll-your own must have gone... the...
we do know through the European schools survey that 5
Norwegian school children are now consuming more
cigarettes than UK school children, and this represents
a significant increase in consumption in Norway. We do
know that manufactured cigarettes have increased in
consumption and from those two (2) statistics, I would 10
strongly believe that roll-your own trends must have
dropped away quite sharply over the past fifteen (15)
years, that there must be fewer roll-your own
cigarettes smoked than there were in... thirteen (13)
years ago, when I testified previously. 15

171 Q- Well, once again, sir, you're speculating on this
issue.

A- That statistical speculation which must be bounded in
fact, I think. Unless consumption in Norway has
increased dramatically, it must... and if cigarettes 20
have increased fast, then it would follow that roll-
your own must have... is quite likely to have fallen
away over that period, if not the total smoking...
total smoking in Norway must have grown quite rapidly
over the past fifteen (15) years. 25

172 Q- You've been qualified, sir, as an expert, so do you
have any documents to show the Court that support your
opinion as to the actual consumption of roll-your own
in Norway?

A- I don't, but I could easily find them, but as I have 5
said, I had confined this analysis to manufactured
cigarette consumption because I believed that that
would show the closest correlation with advertising
expenditure were there a correlation to exist.

173 Q- Sir, roll-your own or cigarettes are not advertised in 10
Norway, so why make the difference?

A- Because I was trying to make the comparison between
countries where advertising of cigarettes existed and
where it didn't, and, obviously, it's the manufactured
cigarette which carries the advertising in most 15
countries. So making a comparison or adding in tobacco
products where there is almost no advertising in any
event would merely have obfuscated and confused the
situation.

174 Q- Don't you think, sir, that at least you could have done 20
in comparing countries to at least take into account
the consumption habits of the smokers?

A- It would have been possible to do that, and it would
also have been possible to take into account price and
a myriad other factors that necessarily influence 25

tobacco consumption. As I said earlier this morning,
I believe that any such study was far beyond my
capacities to undertake, given my other commitments,
and indeed would have required a monumental survey,
taking many years and many people to complete. There 5
are simply too many factors that one could take into
account. I was merely trying to show the difference
between countries... consumption of cigarettes,
manufactured cigarettes in countries with advertising
and contrast that with trends in countries without 10
advertising.

175 Q- You just told us, sir, that such a comparison is
useless if you don't take into account price and many
other factors.

Me SIMON POTTER:

15

Objection, My Lord, that is misstating the
testimony just given.

Me MAURICE REGNIER:

176 Q- Do you consider such an exercise useful, sir, if you
don't take into account the various factors that may 20
differ from country to country, like price,
distribution and the other factors that you're
referring to?

A- I consider the cross-country comparisons of the kind
I've done frequently undertaken by economists and have 25

a tendency, if there is a major impact of a variable such as advertising, there should be some tendency at least for non-smoking countries... I'm sorry, for countries where there is not advertising to be grouped more closely than they are.

5

In the case of my particular table, they... as can be seen very clearly, they... countries with no advertising feature throughout the table and are distributed remarkably evenly in fact throughout the table, and don't seem to bear any relationship whatsoever to the presence or absence of advertising. I do consider that it's a perfectly useful analysis although I did say in my testimony this morning it doesn't prove anything, it is a negative conclusion. This conclusion suggests that something should have been present, had there been an effect from advertising. But nothing can be seen.

10

15

177 Q- Unless you want to compare a country, or other countries, sir, what kind of factors should have you taken into account?

20

A- If advertising is as powerful as being frequently suggested by those wishing to ban it, then, surely, in a country like Canada or Norway, or the UK, some considerable trend would become apparent if numbers of countries were compared together with and without

25

advertising.

178 Q- Isn't it a fact that there are many other factors, sir,
that have a very strong influence on tobacco
consumption?

A- That is true, but I think that in many ways those 5
countries that tried to eradicate smoking by banning
advertising have also tended to implement measures such
as large price increases, which would have, in series
at least, tended to reinforce the advertising impact.
In other words, the countries which have gone to the 10
greatest lengths to ban advertising also probably have
the most health education and the biggest price rises,
at least in a very general sense. And, therefore,
again, I would have expected those other factors to
work towards congregating the countries with 15
advertising bans at the bottom end of this table,
rather than distributing throughout the table. And I
believe that was a fair assumption, albeit, as you've
said, based upon imprecise information.

179 Q- Did you try to compare, sir, the importance of public 20
health education in China versus public health
education in Canada?

A- No, but it's very obvious that public health education
in Canada or in all the developed countries has been
prolific. By the time my children reach the age of six 25

(6) or seven (7), they had already a strong impression that smoking wasn't particularly good for you. And I believe that is true of countries such as France, for example, and Italy where consumption has not fallen very fast. I know France very well, I have... my 5 family lives there and I believe that there has been a great deal of public health information about smoking and its effects. I think the same is probably true of a number of other countries on this list where there has been no great fall in consumption. 10

THE COURT:

180 Q- I guess you disagree with your children, is it?

A- I'm sorry?

181 Q- I guess you disagree with your children.

A- No, I don't disagree with my children, I personally 15 stopped smoking when I had them. I used to smoke before. In fact, I was severely bullied.

182 Q- Sorry, Maître Régnier, c'était une diversion.

Me MAURICE REGNIER:

183 Q- Did you try, sir, to... 20

THE COURT:

Stop smoking. No, you already...

Me MAURICE REGNIER:

184 Q- Did you try, sir, to ascertain the effect of public health education in France in comparison to China, for 25

example? Did you make any studies to compare what is standard health education on smoking in China in comparison to France?

A- No, I've been very clear since the beginning of the testimony, I have simply tried to put together a very 5
simple table looking at growth all trends in consumption and the presence or absence of advertising. And I've made no further attempt to probe into possible reasons for the presence or the particular place of anyone country in this table because it would have 10
required a monumental study that would have taken years and years to perform and undertake. That would have required many people speaking many different languages, investigations of many different factors and I think it was totally beyond me to do that. 15

185 Q- Well, if we look at the example of China, you say that there was a ban in nineteen ninety-six (1996) and that consumption is up one hundred and forty-seven percent (147%). Are you asking the Court to compute that the advertising ban in China conducted this increase in 20
consumption?

A- No, I'm simply saying it was irrelevant. As I've said throughout my testimony, I don't believe that brand advertising has any influence whatsoever on the total levels of consumption. And, therefore, the fact that 25

there is a ban in China but the consumption has risen
is totally in line with my testimony.

186 Q- And do you know why there was an increase, why there's
an increase in consumption in China, sir?

A- This, we're talking here about an increase in *per* 5
capita consumption in China, I would imagine the result
of a collection of factors but not increasing
population.

187 Q- I hardly follow you, sir. You just told us that the
fact that there was an increase shows that your theory 10
about the non-effectiveness of advertising is clearly
demonstrated and, then, you tell the Court that there
are many other factors.

A- No, I didn't say it was clearly demonstrated. I said
it certainly didn't go against it. The fact that there 15
is the presence or the absence of advertising, in my
view, won't make any difference to the rise or growth
of any particular market. And the Chinese market is
growing fast and whatever influences, of course, that
increase is completely in line with the suggestions 20
that I put forward.

188 Q- Would you consider the Chinese market a mature market?

A- I believe that television is prevalent throughout
China. I have a relatively good understanding of that

because I have been... I have talked on numerous occasions to a close friend of mine who has been collecting audience data for television broadcast in China and I believe that if China is present even in very tiny villages in China, it's extremely likely that 5 children, from the very early age, understand that people smoke, because of the medium of television. Even if, around the villages, other people are not smoking.

So, I do believe that there are very few people 10 in China who would be unaware of the possibility of smoking, from quite young ages onwards.

189 Q- Could you please describe to the Court the nature of the restrictions or ban that exist in China?

A- I would have to make reference to a document, My Lord, 15 but we have the, I believe, World Health Organization, it is somewhere.

LA COUR:

P-36, tout à l'heure, madame, vous ne l'avez pas donné, la partie de P-36? Ou le P-34? La lettre. 20

A- I'm now going to read from a World Health Organization document, which was all about various restrictions on advertising. And if we turn to China, which is to be found on page 453, continuing over onto 454, I think you can see that in the right-hand paragraph, half a 25

dozen lines from the top, on page 454, that:

*"Indeed, a ban was imposed on
cigarette and tobacco advertisement by
the Deputy Chinese Public Health
Minister in December, nineteen ninety-
six (1996)".*

5

And I would remind you this is a World Health
Organization document.

Me MAURICE REGNIER:

190 Q- And do you know whether or not this ban is enforced?

A- I'm afraid I don't, but if the WHO tells us that there
is a ban on cigarette and tobacco advertising and many
of the comments, in this document, are qualified, when
there is doubt of what is happening, then I would
assume that it is true.

15

I would also assume that China is not a country
where you mock about too much with the authorities.

191 Q- Are you aware, sir, of the kind of tobacco advertising
that is forbidden or restricted?

A- I'm not, I'm afraid, I know only what the WHO has told
me in this document.

192 Q- Are you aware whether or not sponsorship is forbidden
or authorized?

A- I'm not aware of that at all. But a ban on cigarette

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and tobacco advertising sounds pretty comprehensive.

193 Q- Are you aware or not whether the distribution of free
samples of cigarettes is authorized or forbidden?

A- I don't know. I simply don't know that, I'm afraid.

194 Q- I'd like to draw your attention, sir, to Thailand. 5
THE COURT:

Referring to what document? Still the same one?

Me MAURICE REGNIER:

I'm in Table 1.

THE COURT:

10

Okay.

Me MAURICE REGNIER:

The new Table 1.

THE COURT:

So Table 1 of... isn't it? What is the question? 15

Me MAURICE REGNIER:

195 Q- You say that there's a ban since nineteen eighty-nine
(1989) in Thailand. Would you please describe to the
Court the nature of the ban that is...

A- Well, I would refer you back to the World Health 20
Organization document. And if you turn to Thailand...

LA COUR:

Redonnez-moi le document, madame.

Me SIMON POTTER:

Page 499, My Lord.

25

THE COURT:

Uh-huh.

Me MAURICE REGNIER:

199 Q- I asked you this morning, sir, if you were familiar
with... 5

THE COURT:

First of all, is it your intention to file this
document...

Me MAURICE REGNIER:

Not for the moment. 10

THE COURT:

... "*Tobacco Country Profiles Issue*"? It's up to
you.

Me MAURICE REGNIER:

No, not for the moment. 15

THE COURT:

No?

Me MAURICE REGNIER:

200 Q- I asked you this morning if you were familiar with the
report of the United States Surgeon General. I'm 20
showing you the two thousand (2000) United States
Surgeon General report. I'd like to draw your
attention, sir, to page 316 of this report.

Me SIMON POTTER:

Do we have a copy?

LA COUR:

Vos collègues en ont eu derrière vous, je pense.

Me DOUGLAS MITCHELL:

5

Oui. Moi, je l'ai volée.

Me SIMON POTTER:

Page 316, did you say?

Me MAURICE REGNIER:

Yes, 315. Starting 315.

10

Me SIMON POTTER:

15 or 16?

Me MAURICE REGNIER:

315. Starting 315.

THE COURT:

15

15? Yes.

Me MAURICE REGNIER:

201 Q- Now, the Surgeon General talks about the situation in
Thailand and gives us some explanation of the so-called
ban. And he says at page 316, left column, third 20
paragraph:

"The GATT ruling..."

Are you familiar with the GATT ruling that took
place in Thailand?

A- No, I'm not.

202 Q- Well, it's explained a little bit... on the column.

"The GATT ruling led to an agreement
in November nineteen ninety (1990)
between the United States and Thailand
that allowed the importation of U.S.
cigarettes into Thailand. Imported
cigarettes were then subject to the
same laws and regulations as those
marketed by the Thai tobacco monopoly.
Thus, U.S. cigarettes would be taxed
the same and subjected to the same
supply restrictions, and the
advertising and promotion of these
cigarettes, including the use of
cigarettes or company logos,
trademarks and other symbols on non-
tobacco products would be prohibited.
The Thai government, however, had
indicated that U.S. cigarette
companies have tried to circumvent the
ban on promotional activities by
practices such as sponsoring or
supporting events and placing
cigarette logos or symbols in

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*televised programming. No formal
complaints have been filed."*

Does this help you as to determine whether or not
the so-called ban in Thailand is enforced or not?

A- Not to a great degree, I would suggest, because what 5
has happened in many areas, in many product areas, as
well as tobacco worldwide, is that government... but
particularly in tobacco, because of government
monopolies, is that government monopolies have been
extremely protective of their markets and, therefore, 10
complaining to GATT tribunals or the kinds of
activities, complaining that U.S. cigarette companies
were trying to circumvent bans and so on would be quite
normal practice in many cases.

I'm not suggesting that it has happened in this 15
situation. I am suggesting that protective legislation
and attempts to protect home markets have been really
quite prevalent in, for example, France where the *Loi*
Evan was passed and was widely believed to be a
protective measure of the French drink and tobacco 20
industry. If it happens in France, it might well have
happened in Thailand, but I'm not an expert in either
GATT legislation or what has happened in Thailand.

203 Q- So, once again, that's speculation on your part?

A- It is speculation, but I do believe that protective measures by home tobacco companies could not be taken as firm evidence in either direction of what was really happening on the ground. So I believe it's speculation on your part as well. 5

204 Q- I would like you to read the second paragraph of the right column at page 315 which says:

"Nevertheless, the South Korean Government indicates that some promotional activities of U.S. cigarette companies violate the spirit of the Tobacco Business Act, these allegations concerned distribution of free cigarettes, advertising placement for televised events sponsored by U.S. tobacco firms, the distribution of non-tobacco gifts bearing company trademarks and the targeting of youth. Although no formal actions related to these violations were initiated, the Koreans did..." 10 15 20

I'm sorry, I was on Korea, South Korea.

Me DOUGLAS MITCHELL:

Where?

Me SIMON POTTER:

What page are you on?

THE COURT:

What page is it?

Me MAURICE REGNIER:

5

I'm sorry, I was at page 315. I was at page 315,
which was my other question about South Korea.

THE COURT:

Let's rephrase it.

Me MAURICE REGNIER:

10

Yes.

205 Q- Are you familiar, sir, as to whether or not there's a
ban in South Korea?

A- Only by referring to the WHO document. But I don't
believe there is from the table that we have in front 15
of us.

THE COURT:

206 Q- It's rank 6. Rank 6, is it?

A- I think it's called the Republic of Korea in this
documents. Whether the Republic of Korea is North or 20
South Korea, I'm afraid I wouldn't be able to testify.

Me MAURICE REGNIER:

207 Q- Going back, sir, to Table 1, let's go back to Table 1,
South Korea appears at number...

25

THE COURT:

6.

Me MAURICE REGNIER:

6?

A- 6.

5

208 Q- Yes. So, well, you see that there's an increase of
fifty point fifteen percent (50.15%) in South Korea.

A- Yes, I see that.

209 Q- Okay.

A- Yes, I see that.

10

210 Q- Okay. Are you aware whether or not there's a ban in
South Korea, to your personal knowledge, sir?

A- My personal knowledge is confined to the WHO. document,
and I don't believe... I believe there are
restrictions, but I don't believe there is a ban. 15

211 Q- What kind of difference do you make between a ban and
restrictions?

A- Oh, great difference. There are restrictions in the
UK, but it's still perfectly possible to advertise
tobacco products. A ban is when you can't advertise 20
tobacco products at all.

212 Q- And is it your opinion that from the example we've seen
in Thailand that it was a ban or a restriction?

A- I believe that the intention of the Thai Government,
for whatever reason, was to ban advertising because 25

that's what they say they did...

213 Q- But in...

A- ... or that's what the WHO said they did.

214 Q- But in effect, is it a ban or a restriction that exists
in Thailand? 5

A- According to the World Health Organization, it is a
total ban on advertising.

215 Q- And according to the US Surgeon General, was is it?

A- According to the US Surgeon General, there may have
been some promotion, some small promotions of 10
cigarettes which has gone against the rule thing;
however, we do know that no formal representations have
been made, so it was probably very small scale, I would
imagine.

216 Q- So who am I to believe, sir, the US Surgeon General or 15
the WHO?

Me SIMON POTTER:

My Lord, it is not...

Me MAURICE REGNIER:

217 Q- You're an expert, sir, you... 20

Me SIMON POTTER:

... this is not an expert in the credibility of
the Surgeon General, and the fact is Maître Régnier is
misstating what the Surgeon General actually said. The
Surgeon General said that the GATT ruling struck down 25

a prohibition on imports but left in place the prohibition on advertising.

Me MAURICE REGNIER:

We all can read the Surgeon General report, so...

Me SIMON POTTER:

5

It is... only some of us could.

THE COURT:

Try again. What was your question?

Me MAURICE REGNIER:

218 Q- You just said that the complaints from the Thai 10
Government would have only a small effect on tobacco
consumption, am I correct?

A- No, I didn't say that. I said there had been no formal
representations, I believe, said afterwards, so one
might assume that the contraventions were not terribly 15
important.

219 Q- Well, on what basis can you make such a statement, sir?

A- Why would there be no formal... if there had been a...
if someone had broken a treaty but no formal
representations were made, it would tend... one could 20
tend to assume that... no formal complaints have been
filed at all, one would imagine that it wasn't a
terribly important contravention of the treaty.

220 Q- You're speculating, you're not aware?

A- I'm not aware, but then again, I said many times, I'm 25

not an expert in what happens in these countries and I've never pretended to, and my table never suggested even for a moment that I was an expert in the detail of these things. I've merely been trying to present a cross-section analysis which gives information of a very top line nature, as they say in economics, on both consumption and advertising, the presence and absence of advertising. 5

The fact that a few cigarettes have been given away in Thailand and that a few restrictions have been broken by American tobacco companies is way beneath my power to discern, I'm afraid. 10

221 Q- Why do you use the word "*a few cigarettes have been given away*", who tells you that there were only a few cigarettes given away? 15

A- Well, the fact that the treaty has apparently been broken if the American companies have been doing that, but nobody has bothered to complain is... I obviously can't say "*a few cigarettes*", but if they were giving away enormous amounts and contravening a treaty and the home-based Thai companies were seen to be disadvantaged, I would find it most surprising if a formal complaint wasn't made. 20

222 Q- In what percentage of the Thai population became

addicted to the cigarette after having received these
free cigarettes?

A- I'm sorry, what free cigarettes are we looking at? Are
you talking about the distribution of...

223 Q- It's at page 316, "*Distributing Free Samples*". 5

Me SIMON POTTER:

So that's what you're referring to, those...

Me MAURICE REGNIER:

Yes.

Me SIMON POTTER: 10

... three (3) words in the fifth line on the top,
the right-hand column...

Me MAURICE REGNIER:

Yes.

Me SIMON POTTER: 15

... of 316? Free samples.

Me MAURICE REGNIER:

That's what the witness understood as well.

A- I'm sorry, was there a question?

224 Q- Yes, yes, my question was, without the distribution of 20
these free samples... do you know how many people
became addicted to cigarettes by reason of the
distribution of these free samples?

A- I have no idea.

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Me SIMON POTTER:

My Lord, I'm very sorry to stand and get in the way because I'd like this cross-examination to be over with as soon as possible so that the trial can go ahead. But the fact is this document does not say that Thailand was complaining about American companies handing out free samples. The complaint is in the paragraph which is prior to that and does not refer to free hand-outs. 5

The free sample paragraph states what is in the ban, it doesn't state what is in the complaint, it says what is in the prohibition. 10

THE COURT:

Next question.

Me MAURICE REGNIER:

225 Q- Now, let's go back to South Korea, sir, which is at page 315. Would you please tell the Court... just before that, you told us that you are not an expert in all countries, would you please tell us about which countries you're an expert and on which you could with certainty testify on... 15 20

A- I'm not an...

226 Q- ... countries listed in Table 1?

A- I am not an expert on countries, I am an expert on advertising and the effects of advertising and those 25

sorts of things. I have made no claim to be an expert in Korea or Thailand or any of the other countries listed. It is what economists call "*a cross-sectional study*", which takes simple statistics and compares them in the hope of being able to discern patterns and the 5 two (2) variables that I have compared produce no discernable pattern, I think you would agree, and that is all I have been trying to do with that table. I am not an expert on Korea.

227 Q- Well, the pattern, sir, that you're trying to have us 10 believe is that advertising bans have no effect, that's the pattern that you want us to believe from this report and from this exercise that you've been doing before the Court.

A- I believe it is relatively self-evident when you go 15 through the evidence that exists, that advertising bans are most unlikely to have a pronounced impact on the consumption of food, or drink, or tobacco, or almost any other product. In terms of this sort of country, I might draw your attention to the... one of the 20 fastest growing markets in the world, which is illegal drugs, where no advertising of any description has been allowed certainly in the UK and the United States of America, and yet illegal drugs are growing at a... the

use of illegal drugs is growing at a tremendous and rather sad rate.

228 Q- But we've already discussed that, I don't believe that we should start over again with Mr. Wilkinson's testimony, sir. South Korea, sir, I'd like to draw 5 your attention to South Korea, at page 315 of the Surgeon General Report. I would ask you to read this section about South Korea and to tell us whether you consider that there's a ban or not, or restrictions or not in South Korea? 10

A- Well, they happen to claim there is a ban in South Korea.

229 Q- No, I know. So I'm checking the accuracy of the new table that you were providing us.

A- It states: 15

"Beginning in nineteen seventy-eight (1978), almost all cigarette advertising and promotional activities were banned."

Although that is not what the World Health 20 Organization says.

It also says:

"Some print advertising is now allowed."

I think we have a situation which agrees with the World Health Organization that there is not a total ban on advertising, as I understand it.

230 Q- And there have been complaints as well, if we read the second paragraph, second column on the top of page 315, 5 there have been as well some complaints about, and I'm reading:

"Allegations concerning distribution of free cigarettes, advertising placement for televised events 10 sponsored by U.S. tobacco firms, the distribution of non-tobacco gifts bearing company trademarks and the targeting of youth."

And we have an increase in consumption of fifty 15 percent (50%). Can you say whether or not these marketing activities led to this increase in consumption?

A- I certainly can't say whether it did or whether it didn't. But what I would point out is that the 20 evidence available to me suggests that promotional activities are extremely likely to be in favour of individual brands. American tobacco companies are not noted for their generosity, and I think that it's

is most unlikely to have been the case in Taiwan.

233 Q- I would draw your attention, sir, at page 314, left
column, third paragraph, which reads:

*"Advertising and promotion of U.S.
cigarettes after the agreement are
likely to have contributed to the
large rise in the market share of U.S.
cigarette companies in Taiwan."*

5

It continues:

*"Before the agreement, the only
advertising and promotion permitted by
the Taiwan Tobacco and Wine Monopoly
Bureau were new product announcement
and the use of billboards. In
nineteen eighty-seven (1987), spending
on advertising and promotional
activities by U.S. cigarette firms in
Taiwan rose sharply, but fell somewhat
in the next three (3) years.
Nevertheless, total spending arose
forty-three point eight percent
(43.8%) from nineteen eighty-seven
(1987). Given pre-agreement
restrictions on advertising and*

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promotion, almost all of these expenditures would have been for point-of-purchase and magazine advertising."

Now, does this give you any indication as to 5
whether or not advertising may have had an effect or
not on cigarette consumption in Taiwan?

A- It does. It gives me a very strong indication, because
it actually says quite specifically "Advertising and
promotion of U.S. cigarettes, after the agreement, are 10
likely to have contributed to the large rise in the
'market share of U.S. cigarette companies in Taiwan'".
That is exactly what I would have expected advertising
to do. The advertising for American brands has
increased the penetration of American brands in the 15
Taiwanese market, but is most unlikely to have
increased smoking or the use of cigarettes in general.

234 Q- Well, isn't it a fact that according to Table 1, sir,
of your report, Taiwan... consumption in Taiwan
increased by sixty-two percent (62%)? 20

A- Indeed. But as I said again on many occasions, it is
a fact that whether the cigarette consumption rises or
falls is subject to many reasons. And I'm not... I'm
not able to say why in particular cigarette consumption

risers in some countries and falls in others. But I would... I do see very clearly that even the U.S. Surgeon General believes the effect to have been a brand share one rather than one on the overall market.

235 Q- And do you know what are the reasons for the rise in 5
Taiwan in consumption, the rise in consumption in Taiwan of sixty-two point eighty-nine percent (62.89%)?

A- As I said a moment ago, I have no idea I'm afraid.

236 Q- So you don't know whether it's the advertising and 10
promotion of U.S. cigarettes or not?

A- I believe the advertising of U.S. cigarettes has increased the market share of U.S. cigarette companies, as the Surgeon General states. I think it's unlikely that the advertising of American cigarettes has led to an increase in consumption in Taiwan in total. 15

237 Q- Why do you say it is unlikely? Do you have any figures, do you have any studies, sir, to say whether it is likely or unlikely?

A- Again, as I've said, I have no studies for individual countries which go into enormous depth about these 20
things, but I do believe that most brand advertising is based on attempting to increase brand share. In exactly the same way, if you were trying to sell your second-hand car, you have no interest in what's happening to the overall market for second-hand cars, 25

courant, Votre Seigneurie, de l'existence des rapports
du *Surgeon General*, c'est quelque chose sur laquelle il
s'est basé. C'est que ce n'est pas un document qui est
étranger. Tous ceux qui sont dans le domaine... dans
son domaine, ne peuvent pas l'ignorer. Ça fait partie 5
également de ce que la Cour suprême a utilisé en mil
neuf cent quatre-vingt-quinze (1995) comme preuve
extrinsèque. C'est un exemple parfait qui décrit la
situation dans le monde. Autrement, quelle est la
seule façon de montrer la situation dans un pays, c'est 10
de faire venir les spécialistes de Thaïlande, Corée
du... Corée du Sud.

LA COUR:

Est-ce un document dont vous allez vous servir
avec d'autres témoins par la suite? 15

Me MAURICE REGNIER:

Oui, Votre Seigneurie, ça fait partie, ça va
faire partie...

LA COUR:

Sous réserve de l'objection, de la pertinence et 20
du témoin, nous allons permettre la production pour
l'heure. Notez bien que cette objection, ce n'était
pas plaidé ça, considéré comme retiré, comme toutes les
autres, d'ailleurs.

LA GREFFIERE:

Alors, sous D-36.

LA COUR:

Vous avez, à la première page. I guess we'll
have a short recess, sir, if you don't mind. A fifteen 5
(15) minute recess.

Maître, on fait une petite heure après encore?
Vous en avez pour combien de temps à peu près, moi, je
ne veux surtout pas vous bousculer en quoique ce soit,
je veux seulement voir, pour vos collègues aussi. 10
Comme maître...

Me MAURICE REGNIER:

J'ai besoin de la journée de demain, au moins là.
On avait prévu deux (2) ou trois (3) jours.

LA COUR:

15

Non, non, mais ce qui est prévu, je veux
seulement savoir pour que les gens, en face,
s'attendent: Est-ce qu'il y aura un autre témoin cette
semaine?

Me MAURICE REGNIER:

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Oui, oui, je les préviendrai, Votre Seigneurie.

LA COUR:

N'oubliez pas de me prévenir moi aussi.

Me MAURICE REGNIER:

Je préviendrai la Cour dans un délai raisonnable 25

Peut-être on peut s'arranger avec maître Régnier pour... je ne sais pas, on peut avoir des escomptes de volume, je ne sais pas.

Me MAURICE REGNIER:

Je pense que vos clients sont mieux placés que moi pour ça. 5

Me SIMON POTTER:

Ça sera le cas pour tout le monde de vouloir concrétiser ce calendrier le plus tôt possible et nous nous y mettons, Votre Seigneurie. 10

LA COUR:

Sauf que je ne sais pas si je participerai à vos démarches. Personnellement, ce n'est pas arrivé très souvent que j'ai eu à faire ça, mais il est possible que le Tribunal décide de... 15

Me SIMON POTTER:

Ce sera comme vous voudrez, Votre Seigneurie.

LA COUR:

Occupez-vous de vos choses et c'est très bien. J'hésite à me joindre à un groupe. Alors, vous me 20 direz, c'est pour ça que je veux savoir très bientôt qu'est-ce...

Me SIMON POTTER:

Vous préférez aller par navire.

LA COUR:

25

qu'on se comprenne, le rôle que je fais ne me permettra pas d'envisager un voyage de groupe ou un voyage, ça va être un voyage d'agrément, j'espère, mais vous comprendrez qu'il y aura des personnes, ici, qui seront là. Je resterai juge là-bas, malheureusement. Alors, 5
c'est pour ça que...

Me SIMON POTTER:

Ah! j'ai tout à fait compris, Votre Seigneurie, merci.

LA COUR:

10

Je ne veux pas que ça soit...

Me MAURICE REGNIER:

Vous savez, ce n'est pas une question de fonction, je suis sûr que maître Potter et moi, on n'a pas l'intention de voyager ensemble, de la manière 15
que...

LA COUR:

Vous, vous avez le droit, peut-être que vous pourriez apprendre à vous connaître mieux et à...

Me MAURICE REGNIER:

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Ah! je suis sûr que ce n'est pas la définition du bonheur pour maître Potter, ni la mienne.

Me SIMON POTTER:

Qui sait, on pourrait peut-être régler.

THE COURT:

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239 Q- As you will see, we always laugh in French here.

Me MAURICE REGNIER:

240 Q- You've published in nineteen eighty-three (1983) or
nineteen eighty-four (1984), sir, a paper advertising
in cigarette consumption, I'm showing it to you. 5

THE COURT:

... madame.

Me MAURICE REGNIER:

241 Q- Do you remember this paper, sir?

A- I do, yes. 10

THE COURT:

242 Q- Still agree?

A- I do so, yes, I do.

243 Q- You still agree with...

A- I remember it very well. 15

244 Q- In what year, it was in eighty-three ('83), isn't it?
Yes.

How do you pronounce your name, Maître?

Me SIMON POTTER:

In English, it's Potter. In French, it varies 20
considerably. If you ask Maître Pierre Bourque, it's
Potter. Mais c'est Potter et...

THE COURT:

It's only for Maître Régnier qui... Mais je ne
désespère pas de vous voir prononcer Potter un de ces 25

jours, maître Régnier, comme ça.

Me MAURICE REGNIER:

C'est fort possible, Votre Seigneurie, ça passe
par toutes les gammes.

LA COUR:

5

On a un an, on a un an ensemble.

Me SIMON POTTER:

Pourvu que ça ne soit pas Potter, maître Régnier,
ça va aller.

Me MAURICE REGNIER:

10

Ça va passer par toutes les gammes, Votre
Seigneurie. Tout dépendant, ça dépend de l'heure dans
la journée.

THE COURT:

So what is the question, Maître Régnier?

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Me MAURICE REGNIER:

245 Q- Going back to page 17, sir, if this paper, top
paragraph, right column.

A- Okay.

246 Q- One reads:

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*"Total bans on cigarette advertising
currently exist in Thailand, Taiwan,
Iceland, Singapore, Italy, Norway,
Finland, Saudi Arabia, Iran, Jordan*

*and Somalia. That, on the last four
(4) countries, and this is omitted
from this report since it is not
considered reliable information on the
other countries is given below".*

5

I notice, sir, that you included Jordan in your Table 1. Is there a reason why you decided now that the information was to be considered reliable?

A- I think it was more a question of available, as well as reliable. Some twelve (12), thirteen (13), fourteen 10
(14) years ago, a lot of countries were producing statistics, I mean, erratically. If you look in the Maxwell figures, for example, you will find that some countries, or the U.S. Department of Agriculture statistics, you will find that there are major gaps 15
between years or major disparities, things that look very difficult to believe between individual years.

And although you're asking me to think back a long way now, because this is twenty (20) years ago, not just thirteen (13) years ago, I believe that twenty 20
(20) years ago, when I looked at those statistics, I must have considered that data from those four (4) countries wasn't sufficiently useful to be included. And by "useful", I probably meant either unreliable or

simply not available in some cases.

247 Q- Now...

A- It is however a long time ago, you must understand.

248 Q- No, the question I'm putting to you is why is Jordan
now included in your table? 5

A- Well, when the analysis was done of data that was
available, we found a lot of data from different
sources from Jordan which appeared to be in order and
sufficiently useful to be included. If two (2) or
three (3) or four (4) main statistical sources all have 10
information on Jordan, then it would be fairly obvious
that that data could be used.

These are, I must repeat, data used by the
tobacco companies in their everyday lives, not for the
purposes of compiling statistics for trials or for 15
government purposes. These are simply market data as
used by the tobacco industry that I've been using.

249 Q- Turning to page 19, second right column, third
paragraph, we read that:

*"The Norwegian tobacco market has 20
certain characteristics which make it
different from most other markets in
the free world. Roll-your own tobacco
is done in the form of tobacco*

consumption, while manufactured cigarettes have a relatively less important share of overall consumption."

Once again, why didn't you take this into 5
consideration when you prepared your Table 1?

A- First of all, it was for a different purpose then. And
secondly, it was... we were talking about twenty (20)
years ago when, I believe, the roll-your own market in
Norway was far larger than it is at the moment. 10

Secondly, I was simply using... I was trying to
use figures, I believe, to show absolute levels of
smoking and things of that sort, not for the simple
purposes of cross-country comparison which we have
Table 1 for. So, different time, a long time ago, when 15
things were different, and a different purpose.

250 Q- Do you know what was the level of consumption of roll-
your own in Norway in nineteen seventy-five (1975)?

A- I don't. I did at the time I wrote this paper, I'm
sure, but I certainly don't now. But it must have 20
been, in my view... it can't have grow as quickly as
manufactured cigarettes and has probably fallen
significantly as a share of the market.

251 Q- On what facts do you base this affirmation, this

statement, sir?

A- Simply the fact that the tobacco market overall, I don't believe, has grown very fast in Norway and probably has declined. And we do know that cigarette... manufactured cigarette consumption has increased quite remarkably. Taking those two (2) facts together, one could make the reasonable assumption that roll-your own has declined as a percentage of the market. 5

252 Q- Do you know whether or not the total tobacco consumption in Norway has declined since nineteen seventy-five (1975)? 10

A- I think that total tobacco consumption almost certainly has. But, as I said, I wasn't considering total tobacco consumption for the purposes of this table. 15

253 Q- Now, I would like you to turn to page 20 of this document, last paragraph, left column, almost at the seventh line starting from the end, the sentence starting by:

"But because of these price increases and because of the fact that the consumption figures do not include the border sales, the evidence of nineteen ninety-one (1991) and nineteen ninety- 20

*two (1992) is very difficult to
interpret objectively."*

Now, would you please explain to the Court what
the effect of price increases or the effect of border
sales have on the interpretation of these data? 5

A- Well, clearly, a period of rapid price increase can
have a major impact on market. If prices are
increasing very fast, one would normally expect sales
to fall. But if, in the case of Table 1, this should
have accentuated the grouping that one might have 10
expected to find if advertising bans were present, it
certainly wouldn't be expected to push it into the
other... in the other way.

If price increases are effective, and I believe
they are in most markets, and certainly as far as the 15
tobacco markets of the world are concerned, doubling
price or increasing price very sharply will cut
consumption, it should have increased the grouping of
the advertising ban countries rather than done anything
the other way. 20

So I believe, first of all, again I was looking
at the Norwegian statistics in considerably more detail
for the purposes of this particular report. It was a
different purpose, it was a long time ago, and the

Table 1 is a very different sort of analysis.

254 Q- I'd like to file this document, My Lord, as D-37.

So we've seen that price and other factors may affect, I believe, tobacco consumption in one country. Is there a possibility, for example, that the 5 distribution of free cigarettes may affect the overall consumption in a country?

A- Well, taking the ultimate case, if all cigarettes were given away free, not many people would actually buy them. So, yes, the distribution of free cigarettes 10 would clearly affect purchasing behaviour.

255 Q- Now, what about health education? Do you consider that health education can have an effect on tobacco consumption in one's country?

A- I do. I believe that throughout the developed world 15 we've seen a considerable decline in tobacco consumption over the past twenty (20) years, and a considerable portion of that must be attributable to health education campaigns. I've already referred to the wiggling I got from my own children when they were 20 very small and have been educated to believe that it was better if they didn't smoke.

256 Q- Yes, I think you referred to the very same example in nineteen eighty-nine (1989) at page 2948 of your testimony. Now, do you consider, sir, that more 25

information about the health risk of smoking is likely to affect tobacco consumption in a country?

A- I think that if you provide people with information suggesting that tobacco is likely to be deleterious to their health, then indeed it is very likely that 5 consumption will fall as a result. As long, of course, as the information comes from a source that is felt to be useful in that context.

257 Q- Now, wouldn't you consider this a change in the behaviour of people? 10

A- I think if you tell people that if they cross a road they're likely to be killed, then it certainly has a pronounced impact on their behaviour; if you tell people over and over through the means of television, radio, newspapers and through schools that smoking is 15 likely to damage their health, then I do believe that this is likely to change to some extent or another the behaviour depending on how it's done.

Particularly, it must be said if this is new information that hasn't been prevalent before. 20

258 Q- Now, isn't it a fact when one compares a country versus another, that there are numerous social factors and disparities between the peoples of these countries which must be taken into account?

A- Indeed, I fully agree. 25

261 Q- Now, price is another important factor which influences tobacco consumption in one's country.

A- Price changes tend to affect consumption of almost all products, most products are sensitive to one degree or another to price changes. 5

262 Q- And what about the available income?

A- Available income is a further factor which has to be taken into account if you are attempting to look at the growth or otherwise of the product category in a particular country. 10

263 Q- And what about the political situation?

A- Again, the political situation, I believe there are enormous differences between, for example, countries... well, between countries, there are differences attributable to differences in political systems. 15

264 Q- And what about weather?

A- The weather is very important as far as drink sales are concerned. I know for a fact hot summers tend to be very good for brewers, for example, but I don't believe... or I don't know of any influences that might 20 change smoking behaviour. I know that people smoke in very hot countries and people smoke in very cold countries, so... but again, I wouldn't... I'm not an expert on health effects.

THE COURT:

25

265 Q- So in a way, drinking beer in Great Britain, isn't it?

A- People drink beer in Great Britain because it's very warm, that's correct, yes.

Me DOUGLAS MITCHELL:

The beer or the continent?

5

Me MAURICE REGNIER:

266 Q- Do you know whether or not the demographic situation in one's country is likely to affect tobacco consumption?

A- That I don't know. Obviously, in fact is such as the proportion of old people, the proportion of young people can affect. If we go back to our example of the running shoe, a country with a great number of old people is likely to be less prone to buying running shoes per capita than one where the population is very young.

15

But for tobacco, I have no idea whether... I believe that... I don't... I simply don't know, but I wouldn't... I couldn't offhand offer a layman's views to whether demographic factors are likely to be important or not.

20

267 Q- Well, do you know at what age normally people start smoking?

Me SIMON POTTER:

Objection, My Lord.

Me MAURICE REGNIER:

25

He's an expert, My Lord, in social trends, demographics, whether he may know or he may not know, but I believe that really falls into the scope of his report and testimony so far.

Me SIMON POTTER:

5

This witness has held out no expertise in demographics or social trends, and in any event this witness cannot answer a question, "At what age do people normally begin to do anything."

Me MAURICE REGNIER:

10

My Lord, I have here a book, *UK Market and Social Trends*, first topic, "*Demographics*".

THE COURT:

268 Q- Do you know the answer?

A- If I might comment on the book. I personally didn't 15
produce this book, I have a... I control a company of
a hundred (100) people and some of them may be experts
in demographics and others in social trends, but I
wouldn't claim knowledge... particular knowledge of
either of those categories. 20

269 Q- So you can't answer the question, isn't it? You can't
answer the question.

A- I can't answer the... I can't pretend to be an expert
in those areas, no.

270 Q- Vous retirez votre objection?

Me SIMON POTTER:

Je retire l'objection, oui.

LA COUR:

Sans frais.

5

Me MAURICE REGNIER:

271 Q- And I believe the situation is the very same with Table
1, you had people working on this but you were able to
testify on Table 1. Isn't it a fact that the people
who prepared Table 1 are the very same who prepared 10
this document, *UK Market and Social Trends*?

A- That isn't... no, that isn't true. The person that
prepared these tables is no longer working at my
company, and that document was prepared by a different
selection of people. These tables were prepared for a 15
particular book which is different to that one, and I
don't believe there are many tobacco figures in that
one, certainly there are not international comparisons
of tobacco data.

272 Q- And you did not personally review any of the figures 20
appearing in Table 1?

A- I have personally reviewed these figures appearing in
Table 1 on several occasions, I have checked the method
of calculation, I have looked at the source material

being used, and I have on several occasions been back to verify that the figures are what they purport to be.

273 Q- Now, if we go to the *UK Market and Social Trends 2001*, page 67, you have a chart... table about the prevalence of smoking cigarettes in England. Would that help you 5 answering my question as to at what age people start smoking, for example in England?

A- Well, smoking prevalence appears on the basis of this table to be fairly uniformly distributed through the population from age sixteen plus (16+). 10

274 Q- So is it your answer that there are as many people who start smoking at forty (40) that there are at fifteen (15)?

A- I've no idea, and I don't believe this table provides an answer to that question. 15

275 Q- Going back to your report at paragraph... at page 2, top of the page, you said that:

"In conducting this latter review, I made no attempt to account for any other factors than consumption levels in the presence or not of a ban or restriction". 20

Would you please tell the Court to which factors you were referring to in this sentence?

Me MAURICE REGNIER:

277 Q- So, what are the other factors you're referring to at
page 2 of this report, sir?

A- Well, all other factors. As it says, I made no attempt
to account for any other factors which, by definition, 5
must be all of the factors. I simply made an attempt
to take into account consumption levels in the presence
or absence of an advertising ban. But I did not take
into account social factors, price factors and other
factors of the kind that you've listed over the past 10
ten (10) minutes or so.

278 Q- Isn't it a fact that some people attempted to take
these other factors into consideration?

A- There have been, I don't know of any worldwide reviews
of number of countries which have taken into 15
consideration from an econometric or other standpoint
factors such as social factors, or demographic factors,
or there have been some attempts using econometrics to
take into account factors such as price and factors
such as numbers of people. But taking into account the 20
massive health education, trying to put a value on the
value of health education in Taiwan versus America.
All of these kinds of things would, in my view, be far
too... would make a far too complex an analysis, which
would in all probability obscure what you are trying to 25

find out rather than clarifying.

279 Q- Isn't it a fact, sir, that there has been some
econometric studies which attempted to evaluate the
impact of advertising on the... advertising on
consumption?

5

A- Indeed, and they've usually taken into account simple
things like disposable income and price. But I know of
none which have taken into account the extensive list
of other factors that you questioned me about over the
past ten (10) minutes. I think it would be among a 10
monumental exercise, how could one classify the
importance of health education in Taiwan versus Canada,
versus France? I think it would be an extremely
difficult task. One would be forced to put artificial
values on factors such as health education, which in 15
themselves would be guesses and which could bias the
analysis in numerous different ways, which would be
really very difficult to work out. I believe that
there has been no major attempt, there have been many
minor attempts taking into account factors such as 20
price.

280 Q- Now, is there a reason why none of these reports are
cited in your expert report?

A- I have cited some of them. I think it's paragraph 30.
Many available studies - and I did provide the Court 25

with photocopies of approximately ten (10) or twelve (12) of them - which, in some cases, cover the food industry, and some the drink industry, and some the tobacco industry, and some wider confections of different industries, and in an attempt to provide the Court with some indications of the very large number of studies which, of this kind, which tend to going in the same direction. 5

But I didn't wish to make those studies a principal area for the very reasons that have been spelled out, the fact that it is very different, very difficult to take into account the factors such as health education and so on. 10

All of the major studies that I know of, that have looked at the food industry, for example, tend to show that food advertising does not impact on food consumption, that food advertising is largely brand advertising and the brand advertising, for the reasons I try to go into in some detail, simply isn't powerful enough to stimulate food consumption. A starving man does not have to be told to eat and, similarly, none of us need to be told that food is desirable. We don't need advertising to control the total level of food we ingest. These things happen for other reasons. Advertising is very good at selling brands of food, but 15 20 25

particularly poor at attempting to increase or diminish the total amount of food that we ingest. So that was the purpose of that paragraph.

281 Q- And how many of these studies, these so-called many available studies, specifically deal with tobacco? 5

A- Oh! I would think, then again I never counted them but a number, a fairly numerous number. One of the studies that I have cited, oh! possibly two (2) actually tried to cover the water from... by looking at all of the available studies. In my testimony, thirteen (13), 10 till thirteen (13) years ago, I cited a Federal Trade Commission study, for which had done the same thing in the drinking/tobacco area. There have been several studies that have attempted to cover the overall results from these kinds of econometric study. 15

And, in my view, I believe Martyn... there's one by Martyn Duffy in the evidence, which comes to the conclusion that on balance these studies have tended to come down on the side which I believe to be correct, to the effect that brand advertising is pretty good at 20 selling brands, but rather unfortunately useless at trying to change the volume of drink, consumptional food, consumptional... or even tobacco consumption.

282 Q- Would you please show us, sir, these two (2) studies which specifically deal with the effect of advertising 25

bans on tobacco?

Me SIMON POTTER:

My Lord, I'm taking the liberty of showing to the
witness the copies of the thirteen (13) studies, which
were delivered...

5

A- I eventually, go, yes...

283 Q- You have them okay. Which were delivered to the
Attorney General.

Me MAURICE REGNIER:

A month ago.

10

A- Here we have one econometric study of advertising,
advertising restrictions and cigarette demand survey by
Martyn Duffy of the University of Manchester in the UK.
And he concludes this... he...

284 Q- Just a second, sir, I just want to... Is that the 15
nineteen ninety-six (1996) study by Mr. Duffy?

A- This is a nineteen ninety-six (1996) study by Martyn
Duffy.

Me MAURICE REGNIER:

285 Q- Do you have a copy for the Court?

20

A- Yes.

Me SIMON POTTER:

You have copies already, I believe, confrere?

Me MAURICE REGNIER:

Well, I have only my copy.

25

THE COURT:

So, what is your question?

Me MAURICE REGNIER:

286 Q- So this study deals with tobacco?

A- Yes.

5

287 Q- Do you have any other studies which deal with the issue
of advertising restrictions and cigarette demand?

A- There is one by Michael J. Stewart, "*The Effect on
Tobacco Consumption of Advertising Bans in OECD
Countries*".

10

Me SIMON POTTER:

Should we do the same thing, confrere?

Me MAURICE REGNIER:

Please, please.

288 Q- Now, do you have other studies, sir, which specifically 15
study the situation of tobacco?

A- "*The Effect of Tobacco Advertising Restrictions*" by
Janet Hoek. This was in nineteen... this was in the
collection, I believe, that was given to you. I don't
have the date of it.

20

289 Q- What's the title?

A- "*Effect of tobacco advertising restrictions: weak
responses to strong measures?*" published in nineteen
ninety-nine (1999), in fact.

290 Q- Yes, it was. Do you have a copy?

A- I do have a copy.

THE COURT:

Do you intend to file it, sir?

Me MAURICE REGNIER:

5

Yes, My Lord, under Exhibit... we may start with
Duffy.

THE COURT:

So it's D-38, is it, Duffy?

Me SIMON POTTER:

10

Oui, ça, c'est l'article de Duffy, D-38.

LA COUR:

D-38, Duffy. Ensuite, lequel voulez-vous? On va
commencer par Stewart? Michael Stewart, D-39?

Me SIMON POTTER:

15

Oui.

LA COUR:

Et Hoek, D-40.

Me MAURICE REGNIER:

291 Q- Would you consider the article by Janet Hoek as a study 20
or more of an essay?

A- She looks at two (2) particular kinds of theories which
have been put forward by one of the most famous
professors in the world in marketing, a certain
Ehrenberg, Professor Ehrenberg, ex of London Business 25

in the file, one which reinforces my views.

294 Q- Now, Mrs. Hoek says that:

*"The weak theory of advertising posits
an Awareness-Trial-Reinforcement
sequence. In this model, advertising
plays a minor role in creating
awareness, a trivial role in
stimulating trial, but a major role in
reinforcing existing patterns of
behaviour."*

5

10

My question is as follows: Have you studied in
any manner the effect of advertising on the behaviour
of addicted smokers?

A- No, I restricted myself to looking at cross-country
patterns and patterns of smoking in relation to the
presence or absence of advertising. So I haven't
looked in at behavioural factors in this way.

15

295 Q- Do you know or not whether advertising in this role of
reinforcing existing patterns of behaviour has an
effect to deter smokers to quit smoking?

20

A- I think that, as I've tried to explain earlier today,
the effect of advertising, the effect of brand
advertising on, for example, patterns of brand
consumption can be quite pronounced and, therefore,

it's entirely possible that the advertising of Marlboro cigarettes reinforces the... reinforces people's desire to smoke Marlboro cigarettes, as opposed to some other brand of cigarettes. I don't believe that advertising has the power to reinforce the desire to smoke. I 5 think brand advertising focuses on brands and has very little impact on total market, as explained.

296 Q- But once again, that's pure speculation on your part because you have not made any study specifically on the field of how advertising affects smokers' behaviour 10

A- I have looked at hundreds of case histories looking at the successful application of advertising and indeed on the World Advertising Research Centre database, we have, I think, over three thousand (3000) case histories now which look in very considerable detail at 15 how advertising works. Some of these case histories have been price-winning ones where the mechanism of advertising in working on consumers has been spelled out in considerable detail.

In none of these is there any significant... in 20 none of these case histories of how advertising works is there any significant information or comment nor no suggestion that the people running brands were trying to reinforce car driving behaviour, or drinking behaviour, or smoking behaviour, or washing behaviour. 25

I don't believe that this is what brand advertising tries to do and I don't believe it does it.

And I do believe that I have seen many many instances of successful advertising in action through the pages of my database and most of the case histories 5 in question, of course, not being produced for these sorts of purposes, but being produced for the purposes of illustrating advertising effectiveness, and it is possible that brand advertising reinforces behaviour within the framework of that brand, but I don't believe 10 that it has a role in reinforcing washing behaviour for example.

297 Q- Personally, you have never published any paper, never conducted any systematic research, published any academic paper on that subject? 15

A- No, but I have been in and around the advertising industry for a quarter (¼) of a century and I have never heard people or seen people referring to these kinds of behaviour, and I do believe that in the three thousand (3000) cases just that we have on file, if 20 there is no reference to people trying to stimulate total markets by continuing behavioural patterns is most unlikely to exist as a serious phenomenon within the industry.

298 Q- I would like to draw your attention to page 4 of this 25

document, from Mrs. Hoek, second paragraph, which reads,

"Other researchers have argued that tobacco advertising predisposes or..."

A- I'm sorry, I'm not... oh yes, I got it. 5

299 Q- Page 4.

A- Page 4, okay.

300 Q- *"Other researchers have argued that tobacco advertising predisposes or cues smoking behaviour and that advertising bans are therefore the only mechanism that can circumvent these effects (see Alexander et al., 1983; Ledwith, 1984). Another group has noted that, even if tobacco advertising does not initiate smoking among young people, it increases the general social acceptability of smoking and creates a more favourable environment within which juvenile smoking can take place (Foote, 1981). Overall, these findings (particularly those produced by the Advertising Research Unit) have emerged* 10 15 20

*consistently from carefully conducted
and replicated work, and have provided
powerful support for those groups
advocating the implementation of
tobacco advertising restrictions."*

5

Are you familiar with the study referred to in
this paragraph?

A- I'm familiar with the fact that there are numerous
studies of this kind, usually conducted in
universities, that suggested these facts; however, the 10
following paragraph does point out they have not gone
unchallenged.

301 Q- Uh-huh, and I was coming to this third paragraph, which
reads,

*"However, these findings, and the
calls to action they have supported,
have not gone unchallenged. Smith
reported that when asked why they had
started smoking, few children cited
advertising as a reason (though given
that few people ever cite advertising
as a reason why they perform a given
behaviour, this finding is
unremarkable)."*

15

20

Would you agree with me, sir, that at least your position is far from making unanimity between experts, scholars, academics?

A- I have never suggested that there was unanimity on this subject and indeed a great deal of lack of unanimity 5 emerged thirteen (13) years ago in this trial. What I have suggested is that in my own personal experience, looking at many many many many instances of advertising in action, I don't believe that any of the published works coming from real life case histories support 10 these kinds of findings, and I think that these kinds of findings are highly unusual and not consistent with actual behaviour as it actually takes place in advertising... in the advertising world. People simply do not talk about stimulating the overall market or 15 gaining general social acceptability for eating, or drinking, or smoking.

302 Q- No, but we're talking about smoking, sir, we're not talking about eating, we're not talking about toothpaste, we're talking about a deadly product. So 20 isn't it a fact that increasing the social acceptability of smoking may have bad effects on the population health?

A- I don't believe social... again, I'm not an expert in this area, but I don't believe social acceptability has 25

anything to do with these trends. Were it so, I don't think we would have seen the vast increase in illicit drug consumption that has taken place over the past twenty (20) years in most developed countries.

303 Q- Do you have any knowledge of attempts by the Canadian tobacco industry of increasing the social acceptability of smoking through their promotion activities? 5

A- I'm not party to the actions of the Canadian tobacco industry at all or indeed any other tobacco industry.

304 Q- Did you ask anybody from the tobacco Canadian industry whether or not they were trying to increase their social acceptability of smoking through their marketing? 10

A- No.

305 Q- I would like you to look at page 5 of this paper, third paragraph, Mrs. Hoeks, reads, 15

"However, although the effects of advertising on established smokers may become comparatively less important, its role in reinforcing the development of a smoking habit among juveniles appears more powerful." 20

Do you agree with this statement?

A- No, I don't think so. I believe she comes to the final

conclusion at the end of the paper that advertising is unlikely to have any impact on smoking, which we're being consistent with our statement.

306 Q- Now, would you please tell the Court why you don't agree with Mrs. Hoek's statement that the role of advertising may... that the role of advertising reinforcing the development of a smoking habit among juveniles appears more powerful? Have you personally conducted any studies on the subject? 5

A- No, but we do know, according to the European children... young people survey that more children... more young people, more fifteen (15) and sixteen (16) year old's smoke in Norway, where there is no advertising, than smoke in the U.K., where advertising continues. We do know that most of the increases in smoking amongst young people over the past five (5) or so years appears to come in countries where smoking is banned and that this is a remarkable fact, if indeed advertising is one of the great contributory factors. In countries where smoking... where advertising is banned, tobacco advertising is banned, smoking is increasing apparently rapidly among young people. 10 15 20

THE COURT:

You're asking, Maître Régnier, several questions to the witness in a field where he is not an expert 25

Me MAURICE REGNIER:

Votre Seigneurie, je suis obligé de composer avec
les documents que le témoin remet à la Cour pour
appuyer son expertise.

LA COUR:

5

Très bien.

Me MAURICE REGNIER:

Ce sont ses propres documents.

LA COUR:

Mais il vous répète depuis tout à l'heure qu'il 10
n'est pas un expert dans ça. Je présume que vous aurez
des choses à dire là-dessus en défense?

Me MAURICE REGNIER:

Mais il est suffisamment expert, Votre
Seigneurie, pour appuyer sa théorie à l'effet que la 15
publicité n'a pas d'effet chez les consommateurs, sur
le papier de madame Hoek. Alors, j'imagine qu'il a
dû...

LA COUR:

Sauf qu'au fur et à mesure, quand il répond, il 20
vous dit que, bien que ce ne soit pas son choix
d'expertise, vous voulez que j'en tire quelle
conclusion? Et le témoin nous dit bien honnêtement:
"*My feeling about that*" ou "*My impressions*". C'est

intéressant, mais là où il était expert, c'est dans le champ bien particulier de son expertise et vous posez différentes questions...

307 Q- Sorry, sir, you know, here the choice of the language is the lawyer's, so... 5

A- I understand. I understand perfectly.

308 Q- Alors, vous posez des questions dans un domaine où il ne se reconnaît pas expert, où, je pense, la partie adverse ne le reconnaît pas expert non plus. Vous ne le reconnaissez pas expert. 10

Me MAURICE REGNIER:

Votre Seigneurie, je regarde la question qui lui a été posée dans son mandat, et c'est pour ça que j'ai demandé au tout début de son expertise s'il était spécialiste dans le domaine, dans le champ du consumer 15 behaviour. Si je regarde le deuxième paragraphe à la première page, il dit:

"I've been asked by counsel for the Plaintiffs to review how brand advertising works in markets and what impact brand advertising has on behaviour." 20

Alors, c'est exactement ce que madame Hoek fait, c'est qu'elle regarde quel est le comportement, quel

expertise. J'aurai à trancher. J'aurai aussi à trancher sur son témoignage, mais on n'a pas rien à retirer. Si la Cour en vient à la conclusion que l'expertise d'Engle est une opinion juridique, elle sera mise de côté. 5

Si d'autres opinions, d'autres expertises sont déposées, je les juge non pertinentes, je les déclarerai non pertinentes. Ça n'empêchera pas vos collègues de plaider, peut-être avec erreur, que c'est tout à fait pertinent, vous-même, puis j'en déciderai. 10 Je serai d'ailleurs une des personnes qui décidera.

Bien que, méfiez-vous, parce que j'ai relu encore la Cour suprême, l'expertise du juge de première instance sur l'analyse des expertises est très importante. Ne négligez rien. 15

Me MAURICE REGNIER:

Absolument.

LA COUR:

Mais ici, vous posez au témoin des questions sur lesquelles il se reconnaît lui-même non expert. 20

Me MAURICE REGNIER:

Bien, alors, à ce moment-là, Votre Seigneurie, c'est que ça va attaquer sa crédibilité et la portée de son témoignage dans les affirmations qu'il fait à ce niveau-là. C'est parce que je ne veux pas que la Cour 25

ait l'impression que, parce que c'est écrit dans son rapport, qu'il est expert. Je pense que c'est aussi important pour moi de démontrer à la Cour que le témoignage n'est pas celui d'un expert que pour mes confrères celui de démontrer qu'il y a un témoignage 5 d'expert.

LA COUR:

Bien. Alors, je...

Me MAURICE REGNIER:

Son rapport utilise à plusieurs reprises, et 10 surtout au niveau du paragraphe 30 sur lequel il se fonde, *many available studies*. En plus de ça, en plus de ça, il parle à plusieurs reprises de *evidence* à tour de bras dans son rapport, alors, sans jamais rien citer, sans jamais... on est dans le flou. On a obtenu 15 il y a un mois à peine les études en question. Alors, je pense que c'est important, Votre Seigneurie, que...

LA COUR:

Je vous laisse aller. Je veux simplement attirer votre attention sur... gardez-vous-en pour la 20 plaidoirie. Vous pourrez dire qu'il y a des affirmations qui sont gratuites, parce que non supportées.

Me MAURICE REGNIER:

Je dois au préalable... Votre Seigneurie, je sais que l'exercice est fastidieux, mais je dois au préalable établir les limites de la compétence et les limites de l'expertise de monsieur Waterson, et c'est ce que je fais dans cet exercice.

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LA COUR:

Très bien. Poursuivons.

Me MAURICE REGNIER:

309 Q- Now, do you know, Mr. Waterson, of any studies which took into consideration the fact that... the relationship between the fact that tobacco was an addictive drug and the effect of bans on advertising of tobacco, taking into account the specific nature of the addictiveness of tobacco? 10

A- I don't know how one would take into account the addictiveness of tobacco and I'm not personally familiar with any such study. 15

310 Q- I would like you to turn to page 7 of Mrs. Hoek's paper, first paragraph, the sentence starting with "Given the fact": 20

"Given the fact that the vast majority of advertising bans have been implemented comparatively recently, it would seem unrealistic to expect to

*see significant declines in tobacco
consumption already. Add to this
reasoning the fact that tobacco
consumption is an addictive behaviour
whose chief reinforcement is
physiological gratification and it
becomes even more obvious why the
expected decline in consumption has
not materialized."*

5

So, when you tried, sir, to make an equation, a
relationship between advertising bans and consumption,
did you take into consideration these comments from
Mrs. Hoek?

A- I don't think it would be possible to take into account
a factor such as that in the kind of studies that we're
talking about, and so I did not take it into account.

311 Q- Well, you've read Mrs. Hoek's paper?

A- I read Mrs. Hoek's paper and I read her conclusions to
the effect that governments need to decide whether they
should be addressing problems of advertising
regulation, and if they wish to intervene, possibly
they should turn their attention to controlling
variables, such as price and product availability,
whose relationship with consumption is better

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documented. I agree with her conclusions. I don't necessarily agree with every statement in the paper.

312 Q- You've been repeating, sir, before the House of Commons Committee, before this Court in nineteen eighty-nine (1989) and now today that advertising bans have no effect on consumption, and now Mrs. Hoek tells us that, well, we should take into consideration the fact that nicotine is an addictive... tobacco consumption is an addictive behaviour. Does that not challenge your theory and your conclusion, sir? 5 10

Me SIMON POTTER:

Objection, My Lord. I believe my friend has misstated what the author says in her paper.

Me MAURICE REGNIER:

I don't believe so. 15

THE COURT:

I guess you're referring to the conclusion and he's referring to page 7 or...

Me SIMON POTTER:

Well... 20

THE COURT:

Well, the witness is able to make the correction if there is.

313 Q- So, what is your answer, sir? I'm sorry, could I have the question repeated please? 25

Me MAURICE REGNIER:

314 Q- Yes, absolutely, absolutely. Your theory, sir, which
has been repeated consistently since nineteen ninety-
eight (1998), nineteen ninety-nine (1999) and I've seen
numerous other papers of yours in which you use the 5
very same wording as the one you use in your report
presented before this Court, which is very similar to
the one presented in nineteen eighty-nine (1989). So,
your theory, sir, is to the effect that advertising
bans have no effect on tobacco consumption. Now, Mrs. 10
Hope tells us that the fact that consumption is an
addictive behaviour may explain why the expected
decline in consumption has not materialized. So, the
question I'm asking you is: Does that challenge in
any manner your theory? 15

A- I don't think so. I mean, we've seen, from some of the
statistics, that consumption has fallen by up to sixty
percent (60%) in some countries without any apparent
need to go to clinics or do specialist things. So, as
a layman, I would suggest that if tobacco consumption 20
is an addictive behaviour form, it's a very mild one
which it would be extremely difficult to take into
account in these studies. But I don't agree that the
vast majority of the advertising bans have been
implemented recently, as we've seen again, some of them 25

stretch back to the nineteen sixties (1960's) and, in the case of Norway, to the nineteen seventies (1970's). And I do believe, with all of the... the battery of bans and health education reforms and so on, that had been taken place, that if the absence of advertising 5 was, in any way, related to consumption, we would have seen the no-smoking generation that was forecast in Norway in nineteen seventy-five (1975).

315 Q- What allows you, sir, to say that tobacco addiction is a mild one? 10

A- I didn't say it was a mild one, excuse me, I said that I have seen and we have all seen very significant falls in tobacco smoking behaviour. I did also prefaced the statement by saying I was not an expert in this area. But we have all seen, as laymen and women, the very 15 considerable falls in tobacco consumption in many of the more developed countries.

And it is difficult to imagine that that could have taken place so quickly and in such a short period of time. If, indeed, it is difficult to me, as a 20 layman, to understand how that could take place if, indeed, tobacco was highly addictive. I understand various other forms of illicit drugs are very addictive, but I know many people who will just stop smoking, including myself, without undue drama. That 25

was the basis of the layman opinion I offered to your question.

316 Q- Now, isn't a fact, sir, that tobacco consumption may be
affected by people non starting smoking or people
quitting? Do you know what factors in every country 5
that may influence young people not to start smoking or
people to cease smoking?

A- I don't, but I would repeat, in Norway, where there has
been no advertising of tobacco for a quarter of a
century, smoking behaviour by young people is 10
apparently increasing quite rapidly.

317 Q- Isn't it a fact, sir, that you haven't provided this
Court with any reliable statistics on the situation of
tobacco consumption in Norway?

A- I believe there are many reliable statistics on tobacco 15
consumption in Norway. There are the ones on cigarette
consumption that I have provided to the Court, and if
you would like to see them, I have information provided
and part of it, World Health Organization statement
showing that tobacco consumption amongst young people 20
in many countries with advertising bans, notably
Norway, is actually increasing and has been increasing
for the past five (5) years.

318 Q- Well, isn't a fact, sir, that so far we haven't seen
any evidence, to use your own words, supporting your 25

conclusion about the situation in Norway?

A- I believe that my... the basis of my evidence, the reason that I've been asked to testify is because I have an unusual perspective on the way that brand behaviour and brand advertising works. And I believe 5 that that evidence is the evidence which I was asked to testify on behalf of the brief table at the end of the paper simply is another way of looking at the situation and indicates that there is no possible correlation, no reasonable correlation to be seen in the figures for 10 advertising and consumption, which itself reinforces the situation in Norway where we all know, I believe, that young people are smoking more, as opposed to less, despite the fact there has been no advertising whatsoever in that country for a quarter a century, 15 more than a quarter of a century.

319 Q- Would you describe your exercise as putting Table 1 as a scientific exercise, sir?

A- It is a traditional form of cross-sectional analysis beloved of economists when data or circumstances are 20 too complicated to produce highly detailed surveys for individual countries.

320 Q- Isn't it a fact that you made the very same exercise before this very same court in nineteen eighty-nine (1989)?

25

A- No, it was quite a different series of tables I produced for the Court in nineteen eighty-nine (1989).

THE COURT:

Well, it's four thirty (4:30). We'll be...

321 Q- Is it possible for you to be here tomorrow morning at 5
nine thirty (9:30), sir?

A- Yes, of course.

322 Q- You may sit down if you prefer.

Un peu de quincaillerie. Je reviens à monsieur Power. Combien de temps comptez-vous l'interroger? Ce 10
sera vous, maître Mitchell?

AND FURTHER DEPONENT SAITH NOT FOR THE MOMENT

Me DOUGLAS MITCHELL:

Oui, c'est moi. Je pense une demi...

LA COUR: 15

Parce qu'on a parlé peut-être de demi-journées.

Alors, compte tenu...

Me DOUGLAS MITCHELL:

Oui, je pense une demi-journée, je ne pense pas d'excéder une demi-journée. 20

LA COUR:

Bien, je ne veux pas vous limiter en quoi que ce soit, non plus que maître Régnier, mais ça vous apparaît un peu raisonnable, maître Régnier, monsieur Power? Je veux voir si on fait ça en... 25

Me MAURICE REGNIER:

On avait prévu, je pense que, en deux (2) jours,
Votre Seigneurie, on avait prévu en tout et partout.

LA COUR:

Non, mais vous, vous? Parce que si vous me dites 5
que vous avez besoin d'une journée, ça va peut-être
être trois (3) demi-journées dont on aura besoin, ou
une journée complète. Ça va dépendre de son état de
santé. J'essaye aussi de voir, moi, comment. Vous en
avez pour à peu près une journée ou une demi... 10

Me MAURICE REGNIER:

Si vous permettez?

LA COUR:

Je vous en prie. Alors, peut-être n'est-ce pas
vous qui faites le contre-interrogatoire là, je ne veux 15
pas vous...

Me MAURICE REGNIER:

Ecoutez, Votre Seigneurie, je pense qu'on
pourrait regarder notre plan de contre-interrogatoire
pour monsieur Power et peut-être vous en faire part 20
demain matin?

LA COUR:

Très bien.

Me MAURICE REGNIER:

Mais ça ne dépassera pas une journée, une journée 25

et demie.

LA COUR:

Pour vous?

Me MAURICE REGNIER:

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Oui.

LA COUR:

Une journée, une journée et demie, ça peut donc être trois (3) demi-journées.

Me MAURICE REGNIER:

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On avait prévu deux (2) jours. C'est ça, on avait prévu deux (2) jours, une demi-journée d'interrogatoire en chef et une journée et demie de contre-interrogatoire.

LA COUR:

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Oui, mais on nous dit que peut-être monsieur Power ne sera disponible que par demi-journée. C'est pour ça que je veux savoir, c'est toute la différence du monde entre réserver une chambre pour deux (2) jours, ou trois (3) jours, ou la semaine. C'est rien 20 que ça ou le billet...

Me MAURICE REGNIER:

Oh! moi, je me rends disponible pour la semaine.

LA COUR:

La chambre, il n'y a pas de problème, c'est le 25

billet d'avion de retour. Ça, ça m'apparaît un tout petit peu plus... parce que je n'irai pas en bateau, maître, je vais vous faire... Alors, c'est rien que ça. Vous pensez à ça?

Deuxièmement, vous pensez également...

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Me MAURICE REGNIER:

Je m'excuse, Votre Seigneurie. De toute façon, on n'a pas discuté de détails, mais nous n'avons pas d'objection à ce que le billet soit ouvert, il n'y a pas de problème là-dessus là.

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LA COUR:

Très bien. Vous préparez également pour le vingt-neuf (29)... bon, monsieur Liston, combien de temps?

Me CLAUDE JOYAL:

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Une demi-journée.

LA COUR:

Une demi-journée. Alors, puis, donc, il n'y a personne... Vous, vous n'avez pas un interrogatoire pour monsieur Liston?

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Me SIMON POTTER:

Non.

Me DOUGLAS MITCHELL:

Non, mais je veux juste savoir, je veux le contacter puis je veux savoir à quelle date est-ce

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qu'on procède avec lui.

LA COUR:

Bien, c'est justement, c'est pour ça que je fais
le compte régulièrement. Monsieur, vous en avez pour
la journée de demain avec monsieur Waterson. 5

Me MAURICE REGNIER:

Oui.

LA COUR:

N'est-ce pas?

Me MAURICE REGNIER:

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Oui.

LA COUR:

Ça nous mène à monsieur Ricard le vingt-trois
(23), le vingt-trois (23) après-midi ou le vingt-trois
(23) au matin. Monsieur Ricard, vous l'interrogez 15
combien de temps?

Me SIMON POTTER:

Deux (2) jours. Il est très possible que nous
demandions quelques heures le matin du troisième jour.
Mais on va essayer de faire ça dans les deux (2) jours. 20

LA COUR:

Deux (2) jours. Et vous?

Me MAURICE REGNIER:

Donc, je n'aurai pas... je ne commencerai pas le
contre-interrogatoire avant lundi. 25

LA COUR:

Avant le vingt-huit (28).

Me MAURICE REGNIER:

C'est difficile pour moi d'évaluer. On a prévu une semaine, en tout cas, enfin, quatre (4) jours, je pense, pour monsieur Ricard parce que, étant donné qu'il n'est pas expert, qu'il n'a pas produit de rapport. Alors, c'est assez difficile pour nous d'évaluer la portée de son interrogatoire.

LA COUR:

Seulement à peu près. Je vais vous dire où je m'en viens. C'est que préparez-vous à avoir Corrigall, Castonguay, Ritter, Brouillard, on va commencer même avant monsieur Power, n'est-ce pas? Nous allons donc faire une entorse aux règles habituelles, nous allons 15 commencer la preuve de la défense avant et nous allons commencer ça dans la semaine du onze (11) février. Oui.

Me CLAUDE JOYAL:

On va devoir faire certains ajustements parce que vous comprendrez que, de ce côté-ci de la table, compte tenu du nombre d'experts, on avait évidemment informé les gens de la date approximative en leur disant: "Bien, réservez-vous une (1) semaine avant ou après

parce que ça risque de jouer avec les dates." Alors, ici on va devoir tous les recontacter parce que je sais déjà, par exemple, que monsieur Corrigall ne sera pas disponible avant la date qui lui...

LA COUR:

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Le onze (11) mars?

Me CLAUDE JOYAL:

Avant le onze (11) mars.

LA COUR:

Bien, alors, comme on va être un (1) mois à 10 l'avance, là... pas un (1) mois mais enfin une (1) semaine en avance...

Me CLAUDE JOYAL:

Alors, on va être obligés de peut-être...

LA COUR:

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Oui, oui.

Me CLAUDE JOYAL:

... réorganiser un peu la présentation de notre preuve...

LA COUR:

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C'est pour ça que je vous en...

Me CLAUDE JOYAL:

... suivant la disponibilité des...

LA COUR:

C'est pour ça que je vous en parle pour que vos collègues préparent le contre-interrogatoire. Je vois qu'il y a des témoins d'une (1) journée, par exemple, gênez-vous pas pour les amener. Maintenant, je ne veux 5 pas bousiller non plus votre plan d'organisation, mais on ne passera pas une (1) semaine à ne rien faire. Ça, comptez sur moi, on va... je sens bien que je vous fais travailler fort, mais comptez sur moi, j'ai travaillé aussi en fin de semaine, n'est-ce pas. Alors... 10

Me MAURICE REGNIER:

En fait... mais il va y avoir des questions, Votre Seigneurie, qu'il va falloir plaider et trancher, dont notamment la question du *subpoena* avec la liste de documents que j'ai envoyé à nos amis. Alors, si, 15 évidemment, il y a objection de leur part à la production, il va y avoir des questions au témoin, probablement monsieur Ricard, pour la production de ces documents, ce qui va entraîner un débat qui va quand même être assez long parce qu'il va falloir expliquer 20 à la Cour le pourquoi... pourquoi nous voulons obtenir ces documents pour que vous puissiez en apprécier la pertinence et il va y avoir, je le soupçonne, de fortes objections de l'autre côté. Il faudrait peut-être

prévoir peut-être même presque une avant-midi pour débattre de cette question.

LA COUR:

Oui, oui, mais là, on parle d'une (1) semaine de jeu, alors, préparez-vous.

Me MAURICE REGNIER:

Et ça, cet aspect-là, comme le souligne maître Joyal, doit être réglé avant le début de notre preuve.

LA COUR:

Je ne vous ai pas entendu sur le subpoena? Non, 10
excusez?

Me MAURICE REGNIER:

Non, bien, maître Mitchell m'a indiqué qu'il fallait... que, en toute vraisemblance, on va devoir plaider.

Me DOUGLAS MITCHELL:

Oui, c'est énormément large et ça prendrait des semaines et des semaines de recueillir les documents, même en présumant qu'ils existeraient. Donc, vraiment si vous voulez parler de *hijack the trial*, ça va avoir 20 l'effet.

LA COUR:

Vous me donnerez une copie de ce document-là,
demain matin...

Me MAURICE REGNIER:

Oui, oui, Votre Seigneurie.

LA COUR:

... que je sache de quoi on parle.

Vous voulez ajouter quelque chose, maître Potter? 5

Me SIMON POTTER:

Non, je pense... j'allais vous faire la
suggestion que vous devriez voir la lettre.

LA COUR:

Ah, je veux... encore une fois, je ne suis pas 10
ici pour bousculer quiconque, je veux simplement que
nous prenions conscience ensemble que quand il y aura
des temps libres, je voudrais les remplir. Je viens de
la pratique privée aussi. Bonne soirée.

323 Q- Have a nice evening, sir. 15

AJOURNEMENT

CAUSE CONTINUEE LE 22 JANVIER 2002
